

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**THE WANG THEATRE, INC.**

**and**

**Cases 01-CA-179293**

**BOSTON MUSICIANS ASSOCIATION, A/W  
AMERICAN FEDERATION OF MUSICIANS  
LOCAL UNION NO. 9-535, AFL-CIO**

**RESPONDENT'S OPPOSITION TO SUMMARY JUDGMENT**

Respondent The Wang Theatre, Inc. ("WTI") files this opposition to the General Counsel's Motion for Summary Judgment (the "Motion"), in response to the Notice to Show Cause issued by the National Labor Relations Board (the "Board") on August 8, 2016.

**INTRODUCTION**

WTI has not "refused to bargain" as a "test of certification." WTI has no duty to bargain with the Boston Musicians Association ("BMA" or the "Union") even if its certification were valid. The Board has long held that an employer has no duty to bargain, if there are one or fewer employees in the unit and that is not a temporary condition. *E.g., Rice Growers Assn.*, 312 NLRB 837 (1993). The Board has applied that rule even where a union has been certified within the prior few months. *Westinghouse Elec. Corp.*, 179 NLRB 289 (1969).

It has now been more than 20 months since the certified unit had employees. It is now known that there will not be any employment in the unit for at least an additional 8 months. To the extent the more distant future can be predicted, developments subsequent to the representation case predict that the absence of employees will continue indefinitely. Accordingly, irrespective of the validity of the certification, WTI has no duty to bargain at this time and the Complaint is therefore without merit.

In addition, WTI has not violated the Act because, as far as the Record reflects, BMA has only demanded to bargain over the employment decisions of third-party producers. WTI submits that BMA therefore seeks an unlawful hot cargo provision. *See NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980). And even if the employment decisions of third parties were a lawful subject of bargaining, it is beyond doubt not a mandatory one. As emphasized in the Board's recent joint employer decisions, a certified union can only demand to bargain with an "employer" of a certified unit "as to the terms and conditions it has the authority to control." *E.g., Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 15 (2016). Even if the certification were valid, WTI would have no obligation to bargain unless and until BMA demands to bargain over terms and conditions WTI controls. BMA has not, and the Complaint is therefore without merit for this additional reason.

#### **BACKGROUND**

WTI manages and operates the "Wang Theatre" performance hall, located at 270 Tremont Street in Boston. (Mot., Ex. B at 1.) WTI's business is making the Wang Theatre available to independent producers of touring theatrical musicals, as well as non-musical theatrical performances, concerts, dance shows, and other "star" attractions. (*Id.*) WTI does **not** produce the shows that run at the Wang Theatre. (*Id.*) WTI may "rent" the Wang Theatre, in which case the producer receives all the ticket proceeds and retains all the financial risk. (*Id.*) Alternatively, WTI may "promote" the show, in which case WTI would share the financial risk and upside with the producer. (*Id.*) In either case, the producer controls all decisions involving the show itself — including all decisions regarding the use of music and musicians. The producer determines: (1) "whether live or recorded music will be used"; (2) "how many musicians [are] required for each production"; (3) "whether local musicians will be hired"; and (4) "if [local musicians are hired], how many." (*Id.* at 2-3.)

Not surprisingly, the independent producers have always directly and solely employed the vast majority of musicians who work at the Wang Theatre. Historically, but not since 2014, at the request of a producer, WTI has on some occasions “sourced” musicians for producers to use during their shows’ runs at the Wang Theatre. (*See id.* at 2.) In the more distant past, this was a more regular occurrence, and WTI and BMA had a collective bargaining agreement covering such employees. (*See id.*) The most recent WTI-BMA contract expired in 2007, the parties never negotiated a successor agreement, and the collective bargaining relationship lapsed. (*Id.*) There was no evidence adduced during the representation case regarding when WTI last sourced any musician to a producer for a show that was not a traveling musical. In 2014, the producers of two traveling musicals, *Annie* and *White Christmas*, requested WTI’s assistance in finding local musicians. (*Id.*)

Both producers for whom WTI sourced musicians in 2014 had a collective bargaining agreement with the BMA’s affiliated international, the American Federation of Musicians, (“AFM”). (*Id.* at 2, fn.2.) Indeed, producers of traveling musicals will often have a CBA with the AFM. The AFM-producer CBAs will typically dictate the total number of musicians the producer must use throughout the tour. (*See id.* at 2, fns. 2, 4.) The AFM-producer CBAs will also typically specify the number of “traveling” musicians, who perform at each stop on the tour, as well as the number of “local” musicians, who perform only in one city. (*Id.*)

In 2014, for both musicals, the musicians sourced to the producers were integrated with musicians who were directly hired by the producers. (*Id.* at 2.) Each integrated orchestra played under the supervision of the producer’s conductor, who has “control over the musicians’ performance, regardless of how the musicians are sourced.” (*Id.* at 3.) Neither WTI nor its agents exercise any “traditional supervisory authority” over musicians. (*See id.*)

On January 5, 2016, BMA filed a representation petition with Region 1, seeking an election among musicians “employed” by WTI at the Wang Theatre (Mot. ¶¶1-2.) BMA did not seek a unit that included the producers, or to represent any musicians that the producers may hire without involvement of WTI. (*See id.* at 3) It was undisputed during the representation case that there had not been any unit employment since 2014. (*Id.*) The unit only included those musicians who WTI may source to producers in the future, like it mostly recently had to the two producers in 2014.

WTI argued that the petition should be dismissed without an election, because the petitioned-for unit was not an appropriate unit, and because there were no properly eligible voters even under the BMA’s definition of “employment.” (*See id.* at 1.) On January 28, the Acting Regional Director of Region 1 issued the Decision and Direction of Election, rejecting both arguments and ordering a mail ballot election among those musicians who WTI had sourced to producers in 2014. (*Id.* at 5.) The Acting Regional Director acknowledged that there was no evidence when there would again be employment in the unit, but nonetheless found a “wait-and-see approach to conducting an election” was inappropriate. (*Id.* at 5, fn. 7.)

On February 12, WTI filed a Request for Review with the Board. (Mot. ¶ 3.) BMA opposed that request on March 1. (Mot. ¶4.) On March 14, WTI filed a motion to strike BMA’s opposition on the basis that it relied on facts outside the record. (Mot. ¶ 7.) While the Request for Review was pending, the Region conducted the mail-ballot election, tallying the ballots on March 22. (Mot. ¶ 8.) The majority of cast ballots were for representation by BMA. (Mot. ¶ 8.) On March 30, the Acting Regional Director certified the BMA as the representative of musicians employed by WTI at the Wang Theatre. (Mot. ¶ 9.)

Apparently understanding that its representation of an empty unit would be meaningless, BMA filed — on February 24 — an unfair labor practice charge against WTI with Region 1. (Affidavit of Michael Szczepkowski (“Aff.”), Ex. C.) While the Motion ignores that charge, it underscores the significance of the ongoing absence of employees in the unit. The charge alleged violations of Section 8(a)(3) of the Act in connection with the fact that WTI did not source musicians for two traveling musicals, *Elf: The Musical* and *The Wizard of Oz*. After a full investigation by the Region, BMA withdrew the charge. (Aff., Ex. E.)

*Elf* ran at the Wang Theatre from November 17 to December 6, 2015. (Aff. ¶ 19.) BMA’s claim regarding *Elf* was summarized by the Region’s EAJA Letter, which is attached. (Aff., Ex. D.) The BMA argued that WTI “had a past practice, spanning a period of at least several decades, of finding and hiring local musicians to supplement traveling musicians playing with traveling ‘Broadway-type’ shows whenever those shows are configured to hire both local and traveling musicians.” (*Id.*) The BMA alleged that WTI’s not sourcing local musicians for *Elf* was “the first time in recent memory” it had failed to do so for a show that had an agreement with the AFM, “under which a show would have a musical configuration that typically and traditionally would have resulted in the hiring of a complement of local musicians.” (*Id.*)

The BMA speculated that WTI not sourcing musicians to the producer of *Elf* had an unlawful nexus to BMA filing the representation petition. As WTI explained to the Region, BMA’s theory is temporally impossible. The *Elf* producer had told WTI that it had decided to hire all its musicians and that it would not need WTI to source local musicians — in August 2015. (Aff. ¶ 19.) BMA did not file the RC petition until January 2016. (Mot. ¶ 1.) WTI also noted that if, in fact, no local musicians were hired by the producer, that was an issue for resolution under the AFM-producer CBA.

*Wizard*, ran at the Wang Theatre from April 12 to 24, 2016. (Aff. ¶ 24.) The BMA alleged that “several local musicians” were “hired” and then “unhired” for that show in January 2016. (Aff., Ex. D) As WTI explained to the Region, BMA’s allegation was simply not true. WTI did not “hire and unhire” musicians. The producer of *Wizard* also had a CBA with the AFM. It is WTI’s understanding that contract required the producer to use a mix of traveling and local musicians in Boston. The producer decided that it would not involve WTI to source the musicians. (Aff. ¶ 24.) As WTI understands the facts, it was BMA who suggested that the producer hire local musicians without involvement of WTI. Apparently, the producer used a payroll company, ART Payroll, that has a relationship with BMA. (*Id.*) WTI has never understood why BMA objected to the *Wizard* producer using BMA’s own payroll agent, to hire its own members at Union wage rates.

On June 3, the Board issued a one-page Order denying the Request for Review, as well as the Motion to Strike. (Mot. ¶ 10.) On June 10, Mark Pinto, BMA Secretary-Treasurer, emailed the following “Bargaining request” to Michael Szczepkowski, Vice President and General Manager of Citi Performing Art Center:

The Boston Musicians’ Association (BMA) requests that the Citi Performing Arts Center begin negotiations with the BMA for a successor agreement. Perhaps it would be easiest to begin bargaining after the July 4 holiday, but we would appreciate hearing from you in the next week about which dates your team would be available to meet with the BMA.

(Mot., Ex. K.) On June 29, Szczepkowski responded as follows:

We have received your request to bargain. We are still considering our legal options regarding challenging the bargaining obligation. Nonetheless, without waiving any of our options, we are willing to listen to what you would want to bargain over.

But we are at a total loss as to what we could possibly bargain over at this time.

As you know, there has not been a single employee in the unit since 2014. As you also know, the producers have been hiring their own musicians. We assume that

AFM and the producers have been bargaining over their terms and conditions of employment. There does not appear to be anything for the BMA and WTI to negotiate about.

It may be most efficient for you to send an email listing the issues over which you would like to negotiate. We are also willing to meet and discuss this, understanding that such a meeting would not be bargaining.

(Mot., Ex. L.)

BMA never replied, instead filing the present charge, on June 30. The charge alleges that WTI “refused to bargain” and thereby violated Section 8(a)(5) of the Act. (Mot., Ex. M.) On July 14, the Regional Director of Region I issued the Complaint and Notice of Hearing. (Mot. ¶14.) On July 28, Respondent filed its Answer to the Complaint. (Mot., Ex. Q.) On August 4, the General Counsel filed its Motion for Summary Judgment with the Board, along with a Memorandum in Support of the Motion. On August 8, the Board issued a Notice to Show Cause, directing WTI to respond to the Motion by August 22, 2016.

### ARGUMENT

The Motion should be denied. Respondent acknowledges, as the General Counsel notes, “issues raised, litigated, and decided in a prior representation case may not be litigated in a subsequent unfair labor practice case,..., absent newly discovered or previously unavailable, or unless some special circumstances exist.” (Mem. 3-4.) Respondent also acknowledges that it has preserved its arguments made during the representation case, by reasserting them in its Answer. (See Mem. 3.) But, contrary to the suggestion of the General Counsel, WTI “is not attempting to relitigate the issues underlying the representation case.” (Mem. at 1.) WTI does not offer a defense that requires invalidating the representation case decisions. Rather, for the following reasons, WTI has not violated the Act irrespective of the certification.

**A. WTI Has No Duty to Bargain Because There is No Unit Employment**

The Board has long held that there is no bargaining obligation where there is one or no employees in the unit, and this will likely continue for the foreseeable future. *Kirkpatrick Elec. Co.*, 314 NLRB 1047 (1994) (employer lawfully repudiated contract where unit had one employee); *Rice Growers Assn.*, 312 NLRB 837 (1993) (employer lawfully refused to furnish certain information, because “there were no unit employees who could generate a bargaining obligation”); *Stack Elec.*, 290 NLRB 575, 577 (1988) (employer may withdraw recognition from a union if there are one or fewer unit employees on a permanent basis).

Here, events subsequent to the representation hearing have confirmed that the lack of employment in the unit is not a “temporary” condition. First, the continued passage of time without any work in the unit is itself instructive. Producers have continued to directly hire and solely employ all musicians who have performed at the Wang Theatre. What the Acting Regional Director found was then “unprecedented”, has been repeated. (Mot., Ex. B at 2, fn. 3.) In April 2016, the producer of *The Wizard of Oz* hired all of its musicians without involvement of WTI. The producer of the only scheduled musical, *An American in Paris*, plans to hire directly all of its own musicians for that show’s run at the Wang Theatre, from October 25 to November 6, 2016. (Aff. ¶¶ 26-27.) At the end of the scheduled shows, it will be more than two years since there was last employment in the unit. (See Aff. ¶ 28.)

To the extent the more distant future can be predicted, logic suggests that producers will continue to hire all of their own musicians. There is no legal or business reason for WTI to start sourcing musicians to producers. BMA’s withdrawal of its recent charge concedes that there is no such legal obligation. WTI never made money from sourcing local musicians. It only provided that service to attract producers. If producers agree to bring their shows without this service, WTI will hardly object. And producers have no business reason to involve WTI.



The General Counsel misses the issue. To the extent the General Counsel claims that the lack of unit employment is “nothing more than a continuation of the employment pattern that existed at the time of the representation case hearing”, WTI agrees. (*See* Mem. at 2.) But the General Counsel is wrong that WTI now has a duty to bargain over a no-employee unit simply because the Board rejected its argument that an election should not have been conducted. Regardless of what should have been held during the representation case, there is no duty to bargain at this time. Unlike the employer in the case the General Counsel cites, *Omi 8, LLC, and Orpuna, LLC*, 362 NLRB No. 133, (2015), WTI does not argue that the “composition of a certified unit” has changed. WTI submits that there can be no duty to bargain because there are no employees in the certified unit. Even where a certification has recently issued, an employer has no duty to bargain where the unit has one or fewer employees and that is not a temporary condition. *Westinghouse Electric Corp.*, 179 NLRB 289 (1969) (employer had no duty to bargain where bargaining unit had only one employee, even though Board certification had issued only three months before the employer’s refusal to bargain).

In sum, given that it has been more than 20 months since there was last employment in the unit, and that there is no logical reason to expect employment in the foreseeable future, WTI has no duty to bargain with BMA at this time irrespective of the certification.

**B. BMA Has Not Sought to Bargain Over Terms Within WTI’s Control**

In addition, WTI has not violated Section 8(a)(5) of the Act, also irrespective of the certification, because BMA has not sought to bargain over any terms and conditions of employment that WTI controls. As the DDE admits, WTI has no idea when if ever there will again be employees in the certified unit. (Mot., Ex B at 5, fn.7.) WTI therefore asked BMA the logical question: “What could the parties possibly bargain over at this time?” (*See* Mot. Ex. L.) BMA did not respond to that inquiry.

Unless and until BMA identifies something within the control of WTI over which it wishes to bargain, there has been no violation of Section 8(a)(5) of the Act. As the Board has made clear in its joint employer cases, a certified union can only demand to bargain with an “employer” of a certified unit “as to the terms and conditions it has the authority to control.” *Miller & Anderson, Inc.*, 364 NLRB No. 39, slip op. at 15 (2016). *See also Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015) (“Moreover, as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.”); *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1306 (2000) (“each employer is obligated to bargain only over the employees with whom it has an employment relationship and only to the extent it controls or affects their terms and conditions of employment”)

A union cannot avoid that limitation by seeking a unit including only one employer and then demanding to bargain over terms and conditions outside that employer’s control. WTI does not here seek to relitigate the representation case. The DDE only found that WTI had served as a hiring agent. (*See* Mot., Ex. B at 3.) The DDE found there was “no evidence” where “traditional supervisory authority lies.” (*Id.*). The DDE acknowledged that the producer “must assume the contractual cost” of any employees WTI provides. (*Id.*)

Even if it were proper to order an election based on such a record, that does not mean WTI now has a duty to bargain over terms it does not control. Unions who successfully obtain a unit with two joint employers cannot demand to bargain with one employer about terms outside that employer’s control, irrespective of whether that employer opposed a joint-employer unit. Similarly, here, BMA cannot demand to bargain over terms WTI does not control, just because WTI argued the unit was not an appropriate unit.

### C. BMA Has Only Sought A Hot Cargo Clause

To the extent BMA has articulated a bargaining demand, it was during the representation hearing, and it was an unlawful hot cargo clause. (*See* Aff., Ex. B at 17-18.) Section 8(e) of the Act prohibits any arrangement between an union and an employer, “express or implied”, whereby the contracting employer agrees to “cease doing business with another person.” 29 U.S.C. § 158(e). The “touchstone” of the analysis is whether the agreement is limited to the labor relations of the contracting employer (which here would be WTI) or whether it is also directed at the labor relations of other employers (here the producers). *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980). If the later, then it is an unlawful hot cargo provision. To be lawful, among other things, the “contracting employer must have the power to give the employees the work in question.” *Id.* If not, then the provision is directed at “work acquisition, and not work preservation” and it is therefore unlawful. *See id.* at 511.

During the representation hearing, Union’s Counsel effectively admitted that BMA’s goal would be to negotiate a contract that would require WTI to do business with producers, *only if* the producer would agree to “lay off” the producer’s “touring” employees and to hire “local” employees using WTI as a hiring agent. Counsel explained “what would happen” in cases where the producer had “an AFM agreement”: “If [WTI and BMA] have a collective bargaining agreement ..., what would happen is [the producer] would lay off a number of its touring musicians and [WTI] would hire local musicians and apply that collective bargaining agreement.” (Aff., Ex. B at 17.) Of course, the producer would not be a party to any WTI-BMA agreement. Thus, what Counsel can only mean is an arrangement whereby WTI would only do business with a producer if the producer agreed to “lay off a number of its touring musicians” and use WTI to “hire local musicians.”

Union's Counsel made this more explicit when he addressed "non-union shows." Here, Counsel referenced an agreement between BMA and the Boston Opera House, an unrelated venue in Boston. Counsel admitted that under the arrangement between BMA and the Opera House, "if a non-union show comes, [the producers] have to lay off 50 percent, and **that is an obligation that the venue imposes on a non-union producer.**" (*Id.* 18) (emphasis added.) What Counsel describes is an arrangement unlawful under Section 8(e) of the Act. Its goal is work acquisition and it is directed at the producers' labor relations.

The Act protects the rights of producers to contract with WTI to bring their shows to the Wang Theatre and use their own musicians, be they all "traveling" AFM musicians, all "local" BMA musicians, all non-union musicians, or any other mix that the producer desires, subject to the producers bargaining with a union representative of its own employees. A WTI-BMA arrangement whereby WTI could only contract with producers if they agreed to use BMA musicians is an unlawful hot cargo agreement. For instance, in *Associated Musicians (Huntington Town House)*, 203 NLRB 1078 (1973), the Board held that an AFM Local violated Section 8(e) by seeking to enforce a clause in contracts between Huntington, which operated ballrooms, and its patrons that required the patrons to hire only union musicians "on Huntington's premises." *Id.* at 1082.

### CONCLUSION

Based on the foregoing, WTI submits that the Motion should be denied. If the General Counsel seeks to prove a violation of the Act, it must be at hearing. WTI has the right to present its case that there is no duty to bargain at this time irrespective of the certification, including evidence confirming that the lack of employment in the unit is not a "temporary" condition, and evidence that BMA's only bargaining demand is an unlawful arrangement directed at the labor relations of the third-party producers.

Respectfully submitted,

WANG THEATRE, INC.

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Dated: August 22, 2016

**Certificate of Service**

The undersigned certifies that the foregoing and the accompanying documents have been filed electronically with the National Labor Relations Board on the 22nd day of February 2016, and also a copy has also been sent via email to counsel for Petitioner, Gabriel O. Dumont, Jr., at gdumont@dmbpc.net; and Counsel for the General Counsel, Lynda Rushing, at lynda.rushing@nlrb.gov.

/s/ Arthur G. Telegen



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**BOSTON MUSICIANS ASSOCIATION, A/W  
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LOCAL UNION NO. 9-535, AFL-CIO**

**AFFIDAVIT OF MICHAEL SZCZEPKOWSKI**

I, Michael Szczepkowski, under penalty of perjury, hereby state as follows:

1. I am over the age of twenty-one and a resident of the state of Massachusetts. I have firsthand knowledge of all matters contained herein.

2. I am presently employed as the Vice President & General Manager of the Citi Performing Arts Center. The Citi Performing Arts Center is comprised of two performance halls in Boston, the "Wang Theatre", located at 270 Tremont Street, and the "Shubert Theater", located at 265 Tremont Street. Tremont Theatre, Inc., a nonprofit corporation, manages and operates the Shubert Theater. Wang Theatre, Inc. ("WTI"), a separate nonprofit corporation, manages and operates the Wang Theatre. Since 1996, my employment responsibilities have included serving as the general manager of the Wang Theatre.

3. WTI's business is making the Wang Theatre available to third-party producers of the "shows" that run at the Wang Theatre, which include "touring" theatrical musicals, as well as nonmusical theatrical productions, dance shows, and well-known "star" acts. The entities and production companies that produce these shows vary from show to show.

4. Approximately twenty to twenty-five shows run at the Wang Theatre each year. Since January 1, 2014, 65 shows have run at the Wang Theatre. An additional 18 shows are scheduled to run at the Wang Theatre between now and April 2017. Attached hereto as Exhibit A is a list of the shows since January 1, 2014, including those that are scheduled for future dates.

5. In my current position, I negotiate contracts between WTI and the various producers who bring their shows to the Wang Theatre. A producer may rent the Wang Theatre pursuant to a "four-wall" contract with WTI, in which case the producer receives all ticket proceeds from the show and is fully responsible for all expenses of the show. Alternatively, a producer and WTI may enter into an arrangement whereby WTI will serve as a "promoter" of the show, in which case WTI would handle the marketing of the show. When WTI serves in a promotional role, ticket proceeds will first reimburse the expenses of the show. If any monies are left over, they will be split between WTI and the producer pursuant to a formula set forth in the WTI-producer contract. In 2014 and 2015, WTI served in a promotional capacity for 15 of the 43 shows that ran at the Wang Theatre. In 2016, WTI has or is scheduled to serve in a promotional capacity for 21 of the 37 shows that have or are scheduled to run at the Wang Theatre.

6. In all cases, whether or not WTI serves in a promotional capacity, the producer has sole control over the show itself. In the case of theatrical performances, the producers' directors direct the producers' actors. The producers decide whether to use live or recorded music. If the producer decides to use live musicians, the producer decides how many musicians to use, what instruments they will play, and what music they will perform. The producers' conductors conduct the musicians that perform in orchestras at the Wang Theaters. The producers' employees operate sound and lighting during shows.



7. WTI provides certain ancillary services in connection with operating the Wang Theatre. WTI currently employs ushers, ticket takers, box office employees, stagehands, wardrobe employees, and employees who load and unload trucks. WTI has collective bargaining agreements with various unions representing many of these employees. WTI employs “production” or “house” managers who supervise these employees.

8. Since December 2014, the producers have hired all musicians that have performed at the Wang Theatre, without any involvement of WTI. Historically, but not since 2014, producers had from time to time asked WTI to help them obtain local musicians to use in their orchestras, during their shows’ runs at the Wang Theatre.

9. WTI once had a contract with the Boston Musicians Association, American Federation of Musicians, Local 9-535 (“BMA”). The most recent BMA-WTI contract expired on September 2, 2007, and it was last extended through December 31, 2007. I was involved in negotiation sessions for that and predecessor contracts.

10. WTI and BMA never negotiated a successor agreement to the contract that expired in 2007. WTI and BMA talked after its expiration, but the negotiations stalled because BMA was seeking to bargain with WTI over issues that WTI did not control. Specifically, BMA sought to bargain of whether the producers would use live musicians and, if so, how many.

11. The producers decide how many musicians they will use, if any. Some producers decide to use recorded music. For example, the producer of Alvin Ailey American Dance Theater used recorded music when that show ran at the Wang Theatre in 2014, 2015, and 2016.

12. In the case of touring musicals, the producers often have collective bargaining agreements with the American Federation of Musicians (“AFM”), which addresses the producers’ use of music and musicians.

13. Based on my experience in the industry, it is my understanding that these AFM-producer contracts will dictate the total number of musicians that the producer of the touring musical is required to use at each stop on the tour. It is also my understanding that these AFM-producer contracts will dictate whether the producer will use only “traveling” musicians, who perform at each stop, or will also use different “local” musicians at various cities.

14. If the producer hires local musicians, then the producer may decide to hire them themselves or may ask that WTI provide assistance. In 2014, the producers of two traveling Broadway musicals, *Annie* and *White Christmas*, requested WTI’s assistance in finding local musicians. Each producer had a contract with the AFM. On both occasions, WTI sourced the number of musicians requested by the producer, to play instruments identified by the producer. These were the only shows that WTI sourced musicians for in 2014.

15. WTI paid a local contractor, Fred Buda, who is a member of BMA, to find the musicians requested by the producers of these two musicals. WTI paid the wages and benefits of these musicians in the first instance. WTI was reimbursed those expenses out of the shows’ ticket revenues. The musicians were paid wages and benefits set forth in the “Wage Scales” published by the BMA. The contracts that WTI had with these producers required that the musicians be paid those amounts.

16. The musicians who WTI sourced to these producers were integrated with “traveling” musicians hired by the producers. For *Annie*, the integrated orchestra included 5 traveling musicians and 8 sourced musicians. For *White Christmas*, the integrated orchestra included 2 traveling musicians and 13 sourced musicians. *Annie* ran at the Wang Theatre for 16 performances in November 2014, and *White Christmas* ran at the Wang Theatre for 16 performances in December 2014.

17. The integrated orchestras for both shows performed and rehearsed under the direction of conductors employed by the producers. It is my understanding that the traveling and sourced musicians all worked the same hours.

18. In 2014, WTI did not source or otherwise “employ” any musicians for the other 19 shows that ran at the Wang Theatre that year. WTI did not source or otherwise “employ” any musicians in 2015.

19. One theatrical musical ran at the Wang Theatre in 2015, *Elf: The Musical*. It ran for 24 performances, between November 7 and December 6, 2015. Sometime in August 2015, the producer of *Elf* told WTI that it had decided to hire all of its own musicians and that it would not need WTI to source local musicians.

20. In January 2016, shortly after *Elf* ended its run, WTI was served with a representation petition that BMA had been filed with Region 1 of the NLRB. On January 13, 2016, I testified at a hearing at Region 1 of the NLRB regarding that petition. Attached as Exhibit B hereto is a true and correct copy of the transcript of that hearing.

21. In February 2016, BMA filed an unfair labor practice charge against WTI with Region 1 of the NLRB . Attached as Exhibit C hereto is a true and correct copy of that charge. In March 2016, the Region sent a letter requesting evidence regarding the allegations of that charge. Attached as Exhibit D hereto is a true and correct copy of that letter. In July 2016, the Region sent a letter stating that BMA had withdrawn that charge. Attached as Exhibit E is a true and correct copy of that letter.

22. BMA’s charge alleged that WTI had “hired and unhired” musicians for a traveling musical, *Wizard of Oz*, which was scheduled to run at the Wang Theatre from April 12 to 24, 2016. That allegation is false.

23. It is my understanding that the producer of *Wizard* had a collective bargaining agreement with the AFM that required it to use a mix of traveling and Boston-based musicians during its run at the Wang Theatre.

24. The producer of *Wizard* decided to hire its own local musicians without involvement of WTI. The producer explained to me that BMA's Secretary-Treasurer, Mark Pinto, suggested that the *Wizard* producer not involve WTI. The producer explained that Pinto suggested that the producer use a payroll company, ART Payroll, that has a relationship with BMA. The ART Payroll website — [www.artpayroll.com](http://www.artpayroll.com) — advertises that it will serve as "the employer of record" for theatrical employees covered by a CBA.

25. WTI will not source or otherwise "employ" any musicians in 2016. To date, WTI has not. There are 15 shows scheduled to run at the Wang Theatre between now and the end of the year. The producers of these shows have all indicated that they will either use recorded music or will obtain their own musicians without involvement of WTI.

26. There is one traveling theatrical musical scheduled between now and the end of the year, *An American in Paris*. It is scheduled to run from October 25 to November 6, 2016. WTI has not yet signed a contract with the producer of that show. Based on conversations with the producer, it is my understanding that the producer has a CBA with the AFM that requires it to use a mix of traveling and Boston-based musicians during its run at the Wang Theatre.

27. The producer of *An American in Paris* has indicated that it plans to hire Boston-based musicians using a similar method as was used by the *Wizard* producer.

28. WTI will not source or otherwise "employ" any musician for any show that is currently scheduled for 2017. The furthest out show scheduled is Alvin Ailey American Dance Theater, which will run at the Wang Theatre from April 23 to 30, 2017.

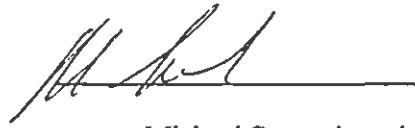
29. Based on my experience in the industry, I expect that WTI will not source or otherwise “employ” any musicians any time in the foreseeable future. Producers of shows other than traveling musicals will continue to hire their musicians directly, or use recorded music. If the producers of traveling musicals have a CBA with the AFM requiring them to use Boston-based musicians, I expect that they will likely obtain them through the method used by the producer of *Wizard*.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 22, 2016.

A handwritten signature in black ink, appearing to read 'Michael Szczepkowski', is written over a horizontal line.

Michael Szczepkowski

I declare under penalty of perjury that the foregoing is true and correct. Executed on  
August 22, 2016.

A handwritten signature in black ink, appearing to read 'M. Szczepkowski', is written over a horizontal line.

Michael Szczepkowski

# EXHIBIT A

|    |   |                              |
|----|---|------------------------------|
| 1  | Rain                                    | February 21-22, 2014         |
| 2  | Shen Yun Performing Arts                | February 28 - March 2, 2014  |
| 3  | Chelsea Handler                         | March 7, 2014                |
| 4  | Hearbeat of Home                        | March 25 - April 6, 2014     |
| 5  | CS Alvin Ailey American Dance Theater   | May 1 - 4, 2014              |
| 6  | Eddie Izzard                            | May 8 - 10, 2014             |
| 7  | il Divo                                 | May 16, 2014                 |
| 8  | Al Pacino                               | June 27, 2014                |
| 9  | Bill Gaither Vocal Band                 | September 5, 2014            |
| 10 | Jason Mraz                              | September 12-13, 2014        |
| 11 | Walden Woods Benefit Concert- The Eagle | September 16, 2014           |
| 12 | Roberto Carlos                          | October 4, 2014              |
| 13 | Neil Young                              | October 5 - 6, 2014          |
| 14 | Theresa Caputo                          | October 7-8, 2014            |
| 15 | Dalai Lama                              | October 30, 2014             |
| 16 | Annie                                   | November 5-16, 2014          |
| 17 | Ryan Adams                              | November 18, 2014            |
| 18 | Bill O'Reilly & Dennis Miller           | December 6, 2014             |
| 19 | Yusuf/Cat Stevens                       | December 7, 2014             |
| 20 | The Piano Guys                          | December 9, 2014             |
| 21 | White Christmas                         | December 16-28, 2014         |
| 22 | Joe Bonamassa                           | January 21, 2015             |
| 23 | Anderson Cooper & Andy Cohen            | March 21, 2015               |
| 24 | Alvin Ailey American Dance Theater      | March 26-29, 2015            |
| 25 | Jerry Seinfeld                          | April 10, 2015               |
| 26 | John Mellencamp                         | April 15, 2015               |
| 27 | Wait, Wait... Don't Tell Me!            | April 16, 2015               |
| 28 | Nashville                               | May 2, 2015                  |
| 29 | Sufjan Stevens                          | May 4, 2015                  |
| 30 | Paramore                                | May 5, 2015                  |
| 31 | Crosby Stills & Nash                    | May 19, 2015                 |
| 32 | Daniel Tosh                             | June 19, 2015                |
| 33 | Mormon Tabernacle Choir                 | July 6, 2015                 |
| 34 | Move- Live On Tour                      | July 7, 2015                 |
| 35 | Diana Ross                              | September 15, 2015           |
| 36 | Josh Groban                             | September 25, 2015           |
| 37 | Kraftwerk                               | October 3, 2015              |
| 38 | Things Your Man Won't Do                | October 22, 2015             |
| 39 | Ringo Starr and His All Star Band       | October 23, 2015             |
| 40 | Festival of Praise                      | October 29, 2015             |
| 41 | Jethro Tull                             | November 5, 2015             |
| 42 | Gladys Knight & The O'Jays              | November 7, 2015             |
| 43 | Elif                                    | November 17-December 6, 2015 |
| 44 | Juan Luis Guerra                        | February 6, 2016             |
| 45 | IL Volo                                 | February 10, 2016            |
| 46 | 2Cellos                                 | February 20, 2016            |
| 47 | Lord of the Dance                       | February 24, 2016            |
| 48 | Rain: A Tribute to the Beatles          | February 26-27, 2016         |
| 49 | Theresa Caputo                          | February 28, 2016            |
| 50 | Star Trek: The Ultimate Voyage          | March 4, 2016                |
| 51 | Loon Bridges                            | March 5, 2016                |
| 52 | Alvin Ailey American Dance Theater      | March 17-20, 2016            |
| 53 | Steve Martin/Martin Short               | April 6-8, 2016              |
| 54 | Andrew Bird                             | April 9, 2016                |
| 55 | Wizard of Oz                            | April 12-24, 2016            |
| 56 | Van Morrison                            | April 26-27, 2016            |
| 57 | Martin Lawrence                         | April 30, 2016               |
| 58 | The Amazing Tour Is Not On Fire         | May 5, 2016                  |
| 59 | Nashville                               | May 6, 2016                  |
| 60 | Riverdance                              | May 10-15, 2016              |
| 61 | Above & Beyond                          | May 17, 2016                 |
| 62 | Cyndi Lauper & Boy George               | May 21, 2016                 |
| 63 | Dolly Parton                            | June 21, 2016                |
| 64 | Maks & Val Live On Tour                 | July 6, 2016                 |
| 65 | Boston                                  | August 14-15, 2016           |
| 66 | Steven Tyler                            | September 4, 2016            |
| 67 | Jenny Lewis                             | September 13, 2016           |
| 68 | Yusuf Islam                             | September 17, 2016           |
| 69 | Ms. Lauryn Hill                         | October 1, 2016              |
| 70 | IL Divo                                 | October 5, 2016              |
| 71 | Scott Bradley's Postmodern Jukebox      | October 6, 2016              |
| 72 | Lake Street Dive                        | October 7, 2016              |
| 73 | Joan Baez                               | October 8, 2016              |
| 74 | Charles Aznavour                        | October 18, 2016             |
| 75 | Anderson, Robin & Wakeman               | October 19, 2016             |
| 76 | Lindsey Stirling                        | October 20, 2016             |
| 77 | Mel Brooks                              | October 22, 2016             |
| 78 | An American in Paris                    | October 25-November 6, 2016  |
| 79 | Straight No Chaser                      | November 30, 2016            |
| 80 | Impractical Jokes                       | December 17, 2016            |
| 81 | Shen Yun Performing Arts                | March 3-5, 2017              |
| 82 | Carol Burnett                           | April 8, 2017                |
| 83 | Alvin Ailey American Dance Theatre      | April 27-30, 2017            |



# EXHIBIT B

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

THE WANG THEATRE, INC., d/b/a  
CITI PERFORMING ARTS CENTER,

Employer,

and

BOSTON MUSICIANS ASSOCIATION,  
a/w AMERICAN FEDERATION OF  
MUSICIANS, LOCAL UNION NO.  
9-535, AFL-CIO,

Petitioner.

Case No. 01-RC-166997

The above-entitled matter came on for hearing pursuant to Notice, before HILARY BEDE, Hearing Officer, at the Thomas P. O'Neill, Jr. Federal Building, Room 690-A, 10 Causeway Street, Boston, Massachusetts, 02222, on Wednesday, January 13, 2016, at 10:00 a.m.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

A P P E A R A N C E S

1 On Behalf of the Employer:  
2

3 ARTHUR G. TELEGEN, Esq.  
4 N. SKELLY HARPER, Esq.  
5 Seyfarth Shaw LLP  
6 World Trade Center East  
7 Two Seaport Lane, Suite 300  
8 Boston, Massachusetts 02210-2028  
9 (617) 946-4949  
10 (617) 946-4973  
11 atelegen@seyfarth.com  
12 nharper@seyfarth.com  
13  
14

15 On Behalf of the Petitioner:  
16

17 GABRIEL O. DUMONT, Esq.  
18 Dumont Morris & Burke, PC  
19 141 Tremont Street, Suite 500  
20 Boston, Massachusetts  
21 (617) 227-7272  
22 gdumont@dmbpc.net  
23

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|   |                      |               |              |                 |                |                  |
|---|----------------------|---------------|--------------|-----------------|----------------|------------------|
| 1 |                      |               |              |                 |                |                  |
| 2 |                      |               | <u>I</u>     | <u>N</u>        | <u>D</u>       | <u>E</u>         |
| 3 |                      |               | <u>X</u>     |                 |                |                  |
| 4 | <u>WITNESS</u>       | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> | <u>VOIR DIRE</u> |
| 5 | Michael Szczepkowski | 22            | 35           | 59              | 60             | --               |
| 6 |                      |               |              |                 |                |                  |
| 7 | Mark Pinto           | 62            | 73           | --              | --             | 72               |
| 8 |                      |               |              |                 |                |                  |

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|    |                |                        |          |
|----|----------------|------------------------|----------|
| 1  |                |                        |          |
| 2  |                | <u>E X H I B I T S</u> |          |
| 3  | EXHIBITS       | IDENTIFIED             | RECEIVED |
| 4  | BOARD'S        |                        |          |
| 5  | B-1(a) to 1(e) | 6                      | 6        |
| 6  | B-2            | 7                      | 7        |
| 7  | PETITIONER'S   |                        |          |
| 8  | P-1            | 69                     | 70       |
| 9  | P-2            | 71                     | 73       |
| 10 |                |                        |          |

P R O C E E D I N G S

(Time Noted: 10:07 a.m.)

HEARING OFFICER BEDE: On the record.

The hearing will be in order. This is a formal hearing in the matter of the Wang Theatre, Incorporated, Case Number 01-RC-166997, before the National Labor Relations Board. The hearing officer appearing for the National Labor Relations Board is Hilary Bede.

All parties have been informed of the procedures at formal hearing before the Board by service of a description of procedures in certification and decertification cases with the notice of hearing. Additional copies of this document have been placed on the tables.

Will counsel please state their appearances for the record? For the Petitioner?

MR. DUMONT: For the Petitioner, Gabriel O. Dumont, Jr.; Dumont, Morris, & Burke, 141 Tremont Street, Boston.

HEARING OFFICER BEDE: For the Employer?

MR. TELEGEN: I'm Arthur Telegen. This is N. Skelly Harper. We're with Seyfarth Shaw, 2 Seaport Way -- Lane.

MR. HARPER: Seaport East.

MR. TELEGEN: Seaport East, Boston, Mass., 02210.

HEARING OFFICER BEDE: Is there a prospective Intervenor in the room?

(No response.)

1 HEARING OFFICER BEDE: Let the record show no response.

2 Are there any other appearances?

3 (No response.)

4 HEARING OFFICER BEDE: Let the record show no response.

5 Are there any other persons, parties, or labor  
6 organizations in the hearing room who claim an interest in the  
7 proceeding?

8 (No response.)

9 HEARING OFFICER BEDE: Let the record show no response.

10 I now propose to receive the formal papers. They have  
11 been marked for identification as Board Exhibit 1(a) through  
12 1(e), inclusive, Exhibit 1(e) being an index and description of  
13 the entire exhibit.

14 (Board's B-1(a) to 1(e) identified.)

15 HEARING OFFICER BEDE: The exhibit has been shown to all  
16 parties. Are there any objections to the receipt of these  
17 exhibits into the record?

18 MR. DUMONT: Petitioner has no objections.

19 MR. TELEGEN: No, ma'am.

20 HEARING OFFICER BEDE: Hearing no objections, the formal  
21 papers are received into evidence.

22 (Board's B-1(a) to 1(e) received.)

23 HEARING OFFICER BEDE: Are there any prehearing motions,  
24 that is, for example, motions to quash subpoenas, made by any  
25 party that needs to be addressed at this time?

1 (No response.)

2 HEARING OFFICER BEDE: Let the record show no response.

3 The parties in this proceeding have executed a document  
4 which is marked as Board Exhibit 2. The exhibit contains a  
5 series of stipulations, including among other items that the  
6 Petitioner is a labor organization within the meaning of the  
7 Act and that there is no contract bar.

8 (Board's B-2 identified.)

9 HEARING OFFICER BEDE: Are there any objections to the  
10 receipt of Board Exhibit 2?

11 MR. DUMONT: No objections.

12 MR. TELEGEN: No, ma'am.

13 HEARING OFFICER BEDE: Hearing no objection, Board  
14 Exhibit 2 is received into evidence.

15 (Board's B-2 received.)

16 HEARING OFFICER BEDE: It is my understanding that there  
17 is a past collective bargaining relationship between the  
18 parties that spans several decades. The most recent collective  
19 bargaining agreement was effective between September 2004 and  
20 September 2007, and is included as part of Board Exhibit 1 as  
21 Exhibit A to the Employer's statement of position. Mr.  
22 Telegen, is that correct?

23 MR. TELEGEN: That's correct. My understanding is that  
24 that contract was extended until December 31, 2007.

25 HEARING OFFICER BEDE: All right. Mr. Dumont, is that



1 correct, to your knowledge?

2 MR. DUMONT: That is the only -- that is the last contract  
3 that was ratified. We had a relationship that continued. We  
4 had a tentative agreement that was negotiated but was not  
5 ratified that would have gone through September 2010.

6 HEARING OFFICER BEDE: All right, thank you. Is anyone --

7 MR. TELEGEN: I'm not sure what the status of that last  
8 point is, but there is evidence to be given on what happened  
9 after December 2007, there should be.

10 HEARING OFFICER BEDE: All right. But we do have just as  
11 background there was a collective bargaining relationship,  
12 somewhat lapsed over time, and there is no current collective  
13 bargaining agreement, although there were some in the past.

14 MR. DUMONT: Correct.

15 MR. TELEGEN: Except for the word somewhat, yes.

16 HEARING OFFICER BEDE: Okay. Are there any petitions  
17 pending in other regional offices involving other facilities of  
18 the Employer?

19 MR. TELEGEN: Not that I'm aware of.

20 HEARING OFFICER BEDE: The parties are reminded that prior  
21 to the close of the hearing, the hearing officer will solicit  
22 the parties' positions on the type, date, time, and location of  
23 the election, and the eligibility period, including the most  
24 recent payroll period ending date and any applicable  
25 eligibility formula, but will not permit litigation of those

1 issues.

2 The hearing officer will also inquire as to the need for  
3 foreign language ballots and notices of election. Please have  
4 the relevant information with respect to those issues  
5 available, at this time. And while I am reading a form letter,  
6 I will point out that while there was a reference to  
7 eligibility formulas not being litigated, we obviously are  
8 going to litigate that, talk about that quite a bit, today.

9 The parties have been advised that the hearing will  
10 continue from day to day as necessary until completed, unless  
11 the regional director concludes that extraordinary  
12 circumstances warrant otherwise.

13 The parties are also advised that upon request they shall  
14 be entitled to a reasonable period at the close of the hearing  
15 for oral argument. Post-hearing briefs shall be filed only  
16 upon special permission of the regional director. In addition,  
17 a party may offer into evidence a brief memo of points and  
18 authorities, case citations, or other legal arguments during  
19 the course of the hearing and before the hearing closes.

20 The Employer has completed, and was included as Board  
21 Exhibit 1(b), a statement of position in this matter. Among  
22 the issues raised by the statement of position are that the  
23 petition should be dismissed as the Employer has not employed a  
24 single musician for over a year. Is that correct, Mr. Telegen?

25 MR. TELEGEN: That is correct.

1           HEARING OFFICER BEDE: The statement of position also  
2 raises the issue that any possible eligibility formula would  
3 leave no employees eligible to vote in an election. Is that  
4 correct?

5           MR. TELEGEN: I think I would not say possible. Any  
6 recognized eligibility formula that the Board has ever adopted.

7           HEARING OFFICER BEDE: What eligibility formula are you  
8 suggesting would be appropriate and which shows that there  
9 would be no employees eligible to vote?

10          MR. TELEGEN: At minimum, any eligibility formula which  
11 would be acceptable would include employees employed within the  
12 last year. There are no employees employed within the last  
13 year. There is no such eligibility formula.

14          HEARING OFFICER BEDE: All right. And your position  
15 statement also made note of you suggested that, and I'm not  
16 trying to restate your position statement, so please correct me  
17 if I'm wrong, that Julliard said that -- the Julliard case said  
18 that 120 hours in the last 2 years would be the broadest, most  
19 inclusive possible formula and that no musicians meet that  
20 formula. Is that correct?

21          MR. TELEGEN: That is also correct, though Julliard,  
22 itself, included in every reported case where there has been a  
23 certification of the bargaining unit, it has included employees  
24 that worked within a year.

25          HEARING OFFICER BEDE: All right. Also noted within the

1 Employer's position statement is the argument that the petition  
2 should be dismissed because bargaining would include multiple  
3 third party independent producers. Is that correct?

4 MR. TELEGEN: Yes.

5 HEARING OFFICER BEDE: Are there any other particular  
6 arguments in your statement of position that I have missed?

7 MR. TELEGEN: The last point may be broader than you  
8 stated it. The Union, as we understand it, seeks to bargain  
9 over such matters as minimum number of musicians to be hired  
10 for particular performances and whether musicians should be  
11 hired for particular performances, for example, recorded music  
12 or other sources of employees.

13 In fact, the Employer as alleged in this case is  
14 essentially a hiring agent on rare occasion for productions  
15 that are on Wang Theatre. If this were in any other context,  
16 the Board would conclude that the Wang is not even an employer,  
17 on the joint employer issue. It is not an employer. All the  
18 terms and conditions of employment are essentially controlled  
19 by the producer.

20 At minimum, it's joint employer, at best it's a joint  
21 employer, and what's critical here is the issues that seem to  
22 have motivated the Union to file a petition in the first place  
23 are matters over which Wang has no control. Under traditional  
24 Board law and certainly under more recent Board law, they  
25 should be negotiating, if with anybody, with the people who

1 control the terms and conditions of employment of the people  
2 who are, we assume, the theoretical represented employees,  
3 although, of course, there are no employees to be represented  
4 at the moment. It's speculative as to when and where they  
5 would be.

6 I will say, Madam Hearing Officer, that this really  
7 warrants a bit more lengthy exposition and it warrants the  
8 parties understanding each other position in a more meaningful  
9 way to assist the regional director in coming to a reasoned and  
10 deliberate conclusion, and briefs would be a useful thing in  
11 this case. Apparently --

12 HEARING OFFICER BEDE: All right, we will discuss the  
13 matter of briefs at the end of the hearing.

14 MR. TELEGEN: I want to say also there is no time issue  
15 here. So, I mean, we haven't had by any -- under any  
16 circumstances an employee in the last 14 months, so presumably  
17 there aren't employees who are there waiting to have their  
18 terms and conditions of employment bargained.

19 HEARING OFFICER BEDE: We have discussed the matter of  
20 briefs off the record. We have now discussed the matter of the  
21 briefs on the record. It's still a decision that's not going  
22 to be made until we finish the hearing.

23 Mr. Dumont, as the first point that Mr. Telegen just  
24 discussed was that the petition should be dismissed because the  
25 Employer has not employed a musician for over a year. Does the

1     Petitioner have any position on that?

2           MR. DUMONT: Yes, we do. I think that the -- our position  
3     is that the Employer in this case is in the current season. In  
4     the theater for the Wang and actually for all theaters  
5     certainly around that I'm familiar with, their seasons are not  
6     based on a calendar year. Their seasons overlap. So we are  
7     currently in the 2015-2016 season. And we will introduce  
8     evidence from the Wang's own web site that identifies that. So  
9     while we would agree that it has been slightly more than a year  
10    since the Wang has employed musician, employment of those  
11    musicians was in the last season.

12           Contrary to my brother, I do not see in the case that we  
13    litigated in Ogunquit, for example, there was no hours  
14    requirement. I also do not believe in what is the most  
15    relevant decision, which I previously cited but I'll just leave  
16    that for later, which is a theater, musicals, single production  
17    per year, one would look at that decision, including the  
18    relevant part of the regional director's decision and you would  
19    look for a long time before you would find any hour  
20    requirement. The requirement is the number of days worked.  
21    And as it was in Ogunquit, you could -- or as in that case,  
22    those were tradition musical performances were people are  
23    working a relatively, you know, three, three and a half hours  
24    for each day.

25           So our first point on this is that under the Kansas City

1 Repertory Theater case and under the Ogunquit case, and  
2 Ogunquit was the DD&E issued, I believe, in March of 2010, that  
3 was in between their season because Ogunquit is under Star  
4 Theater (ph.). And I believe, if I recall, the eligibility  
5 standard was two shows, at least one of which had to be in the  
6 2009 season, which was the preceding season.

7       We are in -- we are currently, as I say, we are currently  
8 in the 2015-2016 season. We've had any number of people who  
9 would qualify, who worked in December. In addition to that, we  
10 would note and, quite frankly, it's something I just discovered  
11 yesterday afternoon so I haven't parched through whether it  
12 will deem to be relevant in an RC case or not, but what we have  
13 learned is that something unique happened relative to the Elf  
14 production, which was in November of 2015. That is for the  
15 first time we'll have evidence to this effect to the extent it  
16 is allowed in this particular forum, for the first time, to the  
17 best of AFM's knowledge nationally, when Rule 24 was invoked  
18 and local musicians were hired for Elf, they were not hired on  
19 the Wang payroll. They were hired on the producer's payroll  
20 and then Wang reimbursed them.

21       And so I understand that doesn't make them the Wang  
22 employees, but what happened in this situation is knowledge  
23 that we were organizing and something that is absolutely unique  
24 for time and memorial happened, so that created a situation  
25 where our people were not technically the Wang employees, even

1    though the Wang reimbursed the producer for the cost of those  
2    employees. So we're in uncharted territory. And I only  
3    discovered this yesterday afternoon when I was going through  
4    that rather large group of documents that that is what  
5    transpired. Technically, local musicians were hired. They  
6    were instead of being put on the Wang payroll, they were put on  
7    the payroll of the producer. And the Wang reimbursed for that  
8    cost. So I don't know where that takes us, but that's the  
9    response on the eligibility issue.

10       HEARING OFFICER BEDE: All right, I think you responded to  
11    all the points that I had raised without prompting, so I think  
12    that we --

13       MR. DUMONT: Except the last one. I haven't responded to  
14    that, I don't believe.

15       HEARING OFFICER BEDE: I think you touched on it by saying  
16    that some of the employees were -- that in the past, musicians  
17    have been hired directly by the Wang and with the musical Elf,  
18    there had been a different format used. But if you have any  
19    further comment to make on the matter of the necessity of  
20    bargaining with different producers, then please comment on  
21    that as well.

22       MR. DUMONT: I will, because there is probably evidence  
23    will go in. If you look in that group of documents, you'll see  
24    the last ratified collective bargaining agreement. If you look  
25    at that agreement, you will see that Article 4 talks about the



1 staffing, and refers to the number of local musicians and the  
2 circumstances in which local musicians will be hired and will  
3 be governed by the terms of the collective bargaining  
4 agreement. You'll see there is a reference to what is called  
5 the Pamphlet B agreement.

6       The Pamphlet B agreement, to my knowledge, has been around  
7 since probably at least in the '80s and maybe earlier than  
8 that. We had at the Wang a series of collective bargaining  
9 agreements that we entered into and governed the relationship,  
10 and the circumstances that are absolutely identical to the  
11 circumstances today. And let me explain, count this as an  
12 opening if you want, but just by virtue of directing, or  
13 narrowing, or focusing the presentation.

14       Using any of the three shows that the record now contains,  
15 the agreement between the Wang and the producer, all three of  
16 those shows, when they came to -- when they went on the tour  
17 were AFM Union shows. The AFM's collective bargaining  
18 agreements with touring producers are referred to as  
19 Pamphlet B. And not all tours come out, from an AFM  
20 perspective, come out as union tours. Probably, when we're  
21 talking about musicals, probably a substantial majority do come  
22 out under the AFM Pamphlet B, but there are some that come out  
23 non-union.

24       Under the Pamphlet B, when an employer such as NETworks,  
25 and NETworks was producer for Elf. When companies like

1   NETworks bring a show on tour, they're the actual company.  
2   They create an LLC. It's just specific to that tour, I'm sure  
3   for legal and liability issues, but that's what they do. But  
4   it's NETworks' presentations.

5         So the producer executes a contract, collective bargaining  
6   agreement, with the AFM. Within that collective bargaining  
7   agreement is Rule 24, which says that when the tour comes to a  
8   Rule 24 city, and Boston is a Rule 24 city, it is required to  
9   lay off and hire local musicians by a particular formula. It's  
10   based principally on the duration of the show. And that has  
11   been in existence for decades.

12        These shows continue, such as Elf, continue to come out  
13   under an AFM agreement. If we have a collective bargaining  
14   agreement such as we currently used to have, what would happen  
15   is Elf would lay off a number of its touring musicians and the  
16   venue would hire local musicians and apply that collective  
17   bargaining agreement. That existed in the last collective  
18   bargaining agreement. Not a thing has changed, so there is no  
19   issue of who sits at the table.

20        The producer gives up its right to control the terms and  
21   conditions of the collective bargaining agreement, of terms and  
22   conditions of the local musician when it executes an AMF  
23   agreement.

24        The second point would be in circumstances where they come  
25   out in non-union shows, we will introduce the collective

1 bargaining agreement with the Opera House, and that has a  
2 provision which says that if a non-union show comes, they have  
3 to lay off 50 percent, and that is an obligation that the venue  
4 imposes on a non-union producer so that the collective  
5 bargaining agreement that we have at the Opera House currently  
6 in place, all 20 pages of it, all the terms and conditions  
7 apply to 50 percent -- at least 50 percent of the musicians  
8 when the non-union show comes and presents at the Opera House,  
9 which one just very recently did in the last few weeks.

10 So there is no issue whatsoever in terms of the Wang  
11 Theatre being able to negotiate a collective bargaining  
12 agreement. Nothing has changed since 2007.

13 HEARING OFFICER BEDE: All right.

14 MR. TELEGEN: Madam Hearing Officer, if I may, I have  
15 enormous respect for my brother and I'm always glad to be  
16 educated about the history of the collective bargaining and the  
17 musical industry, but I just want to remind you that this is an  
18 opening statement. To the extent that we're hearing about  
19 rules and collective bargaining agreements, other things that  
20 he argues pertain to this seating, we need evidence. And  
21 Rule 24 is not in front of you and also probably doesn't trump  
22 the National Labor Relations Act, in any event, which is why  
23 we're out here, today. But I'm hoping someone will testify not  
24 verbally about the contents of your listings when there is a  
25 witness, but documents that will either pertain or not pertain.

1       Worth also saying the 2007 collective bargaining  
2 agreement, the contract expired in 2007, that was not renewed  
3 by the parties presumably voluntarily on both sides. It's  
4 probably the last thing that should control what we're about  
5 because that's an agreement the parties chose not to renew.  
6 Thank you.

7       MR. DUMONT: We will be putting in evidence. But I would  
8 note if you check Addendum G to the last collective bargaining  
9 agreement, which was introduced by my brother, you will see  
10 Rule 24. And I have with me Mr. Mark Pinto, who is the  
11 secretary/treasurer of the Theater Musicians Association, which  
12 is a conference within the AFM. He is also the  
13 secretary/treasurer of the Boston Musicians Association. He  
14 would be able to give us live explanations of how it works in  
15 the theatrical.

16       HEARING OFFICER BEDE: All right, I think that we're all  
17 in agreement that we should move along from summarizing to  
18 presenting some real evidence. I think we understand what the  
19 issues to be litigated are here. So, Mr. Telegen, if you would  
20 like to present your first witness, I think we can do that now.

21       MR. TELEGEN: If I understand the Union's position, and  
22 I'm sorry to keep talking, but I want to be clear where we are.  
23 If I understand the Union's position, anybody whoever, starting  
24 with the -- during the history of the Wang Theatre is in the  
25 bargaining unit, is entitled to vote. Do I correctly

1 understand it?

2 HEARING OFFICER BEDE: Mr. Dumont, is that the Union's  
3 position?

4 MR. DUMONT: I don't believe that I stated that to be my  
5 position. I believe that should be as in the decisions that I  
6 cited, which was 15 in 2 years, as it was in the Kansas City  
7 case and as it was in Ogunquit.

8 HEARING OFFICER BEDE: And by my count, that's about five  
9 people who played in both of those 2014 productions. So the  
10 Petitioner's position is that those five people would be  
11 eligible to vote.

12 MR. DUMONT: Correct.

13 HEARING OFFICER BEDE: All right. Would you like to call  
14 your first witness?

15 MR. TELEGEN: And they are members of the bargaining unit,  
16 just so we're clear, they're the people whom the Union seeks to  
17 represent?

18 HEARING OFFICER BEDE: I think that that is --

19 MR. DUMONT: No, this is something totally different.  
20 That's the eligibility. I thought that's what you -- we're  
21 seeking to represent the bargaining unit that would be the  
22 casual employees who are musicians, who play in the future.  
23 The people who are eligible to vote may or may not, in the  
24 situation where the unit is made up exclusively of casual  
25 employees, which exists in every position, you may in fact have

1 people who vote, who don't. But in this particular case, our  
2 evidence will be that there is a core that regularly work every  
3 show.

4 HEARING OFFICER BEDE: All right. Is that acceptable?

5 MR. TELEGEN: No. But I mean it's what he said.

6 HEARING OFFICER BEDE: Well, not acceptable as in you  
7 agree to it; acceptable as in you understanding what he is  
8 saying.

9 MR. TELEGEN: I heard the words.

10 HEARING OFFICER BEDE: All right, you heard the words.  
11 Would you like to call a witness now?

12 MR. TELEGEN: Yes.

13 HEARING OFFICER BEDE: All right, thank you. Please do  
14 so.

15 (Pause.)

16 HEARING OFFICER BEDE: Please raise your right hand.

17 (Whereupon,

18 MICHAEL SZCZEPKOWSKI,  
19 was called as a witness by and on behalf of the Employer and,  
20 after having been duly sworn, was examined and testified as  
21 follows:)

22 HEARING OFFICER BEDE: Please take a seat. And please  
23 state your name and spell it for the record.

24 THE WITNESS: Yes, for sure. My name is Michael  
25 Szczepkowski. It's S-Z-C-Z-E-P-K-O-W-S-K-I.

1 MR. TELEGEN: Would you please spell Michael?

2 DIRECT EXAMINATION

3 BY MR. TELEGEN:

4 Q By whom are you employed?

5 A City Performing Arts, Inc. (ph.).

6 Q Who does the Wang Theatre, Inc., relate to that entity?

7 A Wang Theatre, Inc., is a not-for-profit company that  
8 operates the Wang Theatre under a long-term lease arrangement.

9 Q What other entities comprise the Wang Performing Arts  
10 Center?

11 A We also operate the Shubert Theatre under a not-for-profit  
12 company called Tremont Theatre, Inc.

13 Q And Tremont Theatre, Inc., and Wang Theatre, Inc., are  
14 separate corporations?

15 A They are.

16 Q Just so were clear, I'm going to ask you whether various  
17 entities produced other entities. And so our glossary for this  
18 hearing is clear, what's your understanding of the word  
19 produce?

20 A A company that produces maintains artistic control over a  
21 production, besides the elements of production that is out on  
22 the road or that's going to be traveling into various  
23 performing centers.

24 Q Has Wang Theatre ever produced a show?

25 A No.

- 1 Q Who produces the shows -- I take it things, productions do  
2 appear at the Wang, is that correct?
- 3 A Productions appear at the Wang.
- 4 Q Who produces the productions that appear at the Wang?
- 5 A Independent producers, independent -- various companies.  
6 NETworks is one of them. There are many different producers,  
7 whether it be star attractions or touring musicals.
- 8 Q Again so our glossary is good, what is a star attraction?
- 9 A A star attraction would be something like Van Morrison  
10 playing at the theater or Josh Groban, or anything along those  
11 lines, a known musical act, musical star.
- 12 Q In other words, a name that the public might be attracted  
13 to come and see?
- 14 A Correct.
- 15 Q And pay to come and see?
- 16 A Correct.
- 17 Q What is a musical?
- 18 A A recognized touring, Broadway theatrical, musical  
19 theatrical production.
- 20 Q Give the hearing officer an example.
- 21 A Annie, White Christmas, Elf.
- 22 Q You just testified, I believe, the producer of those  
23 various productions may vary from production to production?
- 24 A Would vary from production to production.
- 25 Q How long have you been employed?



- 1 A I am going into my 20th year, 19 1/2 years.
- 2 Q In your experience, how many productions out of each year  
3 are at the Wang Theatre?
- 4 A We do probably 20 to 25 currently.
- 5 Q Do you recall how many there were in 2015?
- 6 A Something in that range. I don't remember the exact  
7 number.
- 8 MR. TELEGEN: Madam Hearing Officer, attached as Exhibit D  
9 to the position statement we filed is a list. I'm going to  
10 show it to authenticate it.
- 11 HEARING OFFICER BEDE: All right.
- 12 BY MR. TELEGEN:
- 13 Q Could you tell the hearing officer what's Exhibit D?
- 14 A This is a list of shows that took place from January 2014  
15 through the end of December 2015.
- 16 Q That document has at the top shows that did not require  
17 local musicians, is that accurate, those shows listed there did  
18 not have local musicians?
- 19 A That's correct.
- 20 Q And what's below are the three shows -- two shows in 2014  
21 that did have local musicians?
- 22 A That's correct.
- 23 Q When there is a production to be scheduled at the Wang,  
24 what's the Wang Theatre's role in relationship to the  
25 production?

- 1 A The Wang Theatre can either be rented by a producer or  
2 another promoter to present the show, or the Wang Theatre can  
3 undertake to promote the show, itself.
- 4 Q When the producer rents the Wang, what does that mean?
- 5 A When the producer rents the Wang Theatre, they receive all  
6 of the ticket proceeds from the show. They are fully  
7 responsible for all of the expenses of the show. The Wang  
8 Theatre will provide assistance when requested by a producer,  
9 but the responsibility for everything falls on the producer.
- 10 Q Putting musicians aside, the Wang Theatre has employees,  
11 is that correct?
- 12 A That's correct.
- 13 Q Some of those employees work during a production?
- 14 A That's correct.
- 15 Q Which employees -- can you describe the categories of  
16 employees that that entails?
- 17 A The Wang Theatre has house managers. Wang Theatre has box  
18 office employees. The Wang Theatre has stagehands, wardrobe  
19 employees.
- 20 Q Are they employed pursuant to collective bargaining  
21 agreements?
- 22 A Some of them are.
- 23 Q Are those employees supervised by employees of the Wang?
- 24 A They are.
- 25 Q Describe the differences that occur when the Wang Theatre

1 is the promoter of the show, as opposed to simply renting the  
2 hall.

3 A The difference is that the Wang Theatre has more of a  
4 financial risk in the outcome of the show. We negotiate an  
5 arrangement with the show, with the producer, for certain terms  
6 of what we will pay the producer financially. We typically  
7 will then handle the marketing of the show and provide other  
8 services needed for the show. Those are then, from the ticket  
9 proceeds, those expenses are reimbursed first to pay for the  
10 show and then to pay for the other expenses. And any monies  
11 left over are then split. Again, based on the financial  
12 arrangements with the show, there would be some type of a  
13 financial split with the producer.

14 Q I want you to turn your attention to the people who  
15 actually produce the music at the Wang Theatre when there is a  
16 production. Who hires the people who play instruments and sing  
17 at the Wang?

18 A Typically, those come with the producer.

19 Q For a star attraction, who is on stage?

20 A Obviously, the star, and whatever supporting musicians  
21 travel with them, their orchestra.

22 Q Addressing your attention to say the last two years, who  
23 has hired the supporting musicians?

24 A The producer.

25 Q With respect to the musicals, who hires the musicians --

1 well, first of all, who hires the performers of the musical,  
2 the singers and the dancers that are part of the show?

3 A The producer of that particular show.

4 Q Sometimes there is a supporting orchestra, is that  
5 correct?

6 A That's correct.

7 Q Who hires the people who play in the orchestra?

8 A Normally, the producer hires the orchestra. And  
9 occasionally they will ask to have additional local people  
10 provided for them.

11 Q With respect to the orchestra, is it all one or all the  
12 other, all travelers versus all --

13 A There's been cases of both.

14 Q It's a mix of the orchestra?

15 A Correct.

16 Q Who decides whether the people in the orchestra will be  
17 traveling with the show versus hired locally?

18 A The producer.

19 Q If the producer decides that the musicians will be hired  
20 locally, what are the alternatives that could occur in terms of  
21 obtaining the musicians?

22 A They could hire them, themselves, or they could request  
23 that we provide them assistance in hiring he musicians.

24 Q If they request that you provide assistance, what do you  
25 do?

- 1 A We have a contractor that we work with, that we've worked  
2 with for many years, and that contractor then will go and find  
3 the musicians that are being requested by the producer and  
4 bring them to the show.
- 5 Q Again, let's get a glossary here. When you say  
6 contractor, do you mean an agent hired by you?
- 7 A An individual that works, yes, to hire the musicians.
- 8 Q And he or she would find musicians, source musicians to  
9 fit the needs of the show?
- 10 A That's correct.
- 11 Q Who decides what the needs of the show are?
- 12 A The producer.
- 13 Q So the agent doesn't go out and say I think the show needs  
14 a timpani, we're going to get a timpani player?
- 15 A No.
- 16 Q There's a list of what instruments are necessary?
- 17 A Correct.
- 18 Q Over the course of the last several years, do the rates of  
19 pay get negotiated by the agent directly with the musicians?
- 20 A Over the last several years, we have been using a standard  
21 rate card provided by the union, by the Boston Musicians  
22 Association.
- 23 Q That's been universal?
- 24 A Yes.
- 25 Q We've been assuming that the productions require live

- 1 music. Are there occasions when there is music but it's not  
2 live?
- 3 A There are productions that have traveled, Radio City  
4 Christmas Spectacular is an example of one. There are some  
5 dance companies that come into the theater, such as Alvin  
6 Ailey, that do not use live music.
- 7 Q Alvin Ailey is a dance troop, is that right?
- 8 A That's correct.
- 9 Q I just want to make sure the hearing officer is familiar.
- 10 A Yes.
- 11 Q Who decides whether to use recorded music or live music?
- 12 A The producer.
- 13 Q Does the orchestra have a conductor?
- 14 A Yes.
- 15 Q Typically?
- 16 A Typically. You're talking about for a Broadway show?
- 17 Q Yes.
- 18 A For a Broadway show, yes.
- 19 Q And the conductor tells -- who decides what music can be  
20 played?
- 21 A Who decides?
- 22 Q What music is going to be played.
- 23 A The producer.
- 24 Q They just don't get off and decide to play their own songs  
25 during the course of the show, okay. And who conducts the

1 music?

2 A The conductor that comes with the show.

3 Q He or she is an employee of the producer?

4 A The producer.

5 MR. TELEGEN: Madam Hearing Officer, there is a collective  
6 bargaining agreement that both parties have identified as being  
7 in the record.

8 HEARING OFFICER BEDE: Yes.

9 MR. TELEGEN: You don't need me to have that  
10 authenticated, is that correct?

11 HEARING OFFICER BEDE: That's correct.

12 MR. TELEGEN: And there is a wage sheet that's also  
13 attached there. I assume there is no disagreement that really  
14 is the wage sheet that's used. Is that fair, Gabe?

15 MR. DUMONT: Yes, that's fair.

16 HEARING OFFICER BEDE: All right.

17 BY MR. TELEGEN:

18 Q The hearing officer heard discussion about an agreement  
19 that was in fact through 2007. Did the Wang want to negotiate  
20 a new agreement? Did it want a successor agreement?

21 A The Wang talked with the Boston Musicians Association, but  
22 I would have to say we reached a point where I think we felt  
23 that we could not bargain over things that we didn't control.

24 Q What things were those that you couldn't control or you  
25 didn't want to bargain over?

- 1 A Whether there were live musicians, whether the number of  
2 musicians to be employed.
- 3 Q Was there ever an agreement reached?
- 4 A No.
- 5 Q In 2015, is it correct that there were no musicians  
6 employed by the Wang Theatre, is that correct?
- 7 A That's correct.
- 8 Q And in 2014, how many shows had live musicians that were  
9 hired by the Wang?
- 10 A We provided musicians for two shows, for Annie and for  
11 White Christmas.
- 12 Q Did the Wang's agent source all the musicians for those  
13 shows?
- 14 A Just the number requested by the producer.
- 15 Q And if you recall, do you recall how many for each?
- 16 A I believe Annie was eight musicians were provided by the  
17 Wang and five traveled with the show.
- 18 Q Okay, let's stop there for the moment. If you were  
19 attending an Annie performance and you could see into the  
20 orchestra pit, could you distinguish which of the musicians  
21 were hired by the Wang and which musicians were hired by the  
22 producer?
- 23 A No.
- 24 Q Were they supervised in the same way?
- 25 A Yes.



- 1 Q Do they have the same hours?
- 2 A To the best of my knowledge, yes.
- 3 Q The same rehearsals?
- 4 A Yes.
- 5 Q Did they all answer to the same conductor?
- 6 A Yes.
- 7 Q Do you recall on White Christmas what the mix was? If you
- 8 don't, that's okay.
- 9 A I believe 13 were hired in Boston and 2 traveled with the
- 10 show.
- 11 Q I'll ask you the same question. If you could see into the
- 12 orchestra pit, could you distinguish which of the musicians
- 13 were hired by the Wang versus which were hired by the producer?
- 14 A No.
- 15 Q Do they all attend the same performances?
- 16 A Yes.
- 17 Q They all play the same score?
- 18 A Yes.
- 19 Q They all answer to the same conductor?
- 20 A Yes.
- 21 Q They all attend the same rehearsals?
- 22 A To the best of my knowledge, yes.
- 23 Q Who decided how many would be hired by the Wang versus how
- 24 many would be hired by the producer?
- 25 A The producer.

1 MR. TELEGEN: Madam Hearing Officer, I make reference to  
2 Exhibit E.

3 BY MR. TELEGEN:

4 Q First, in general terms, can you tell the hearing officer  
5 what Exhibit E is?

6 A It's a summary of musicians and the amount of hours that  
7 they worked in the last two years.

8 Q Can you tell the hearing officer how the hours were  
9 calculated?

10 A As you can see, in 2015, there were no hours worked, as  
11 we've said. 2014 was the productions of Annie and White  
12 Christmas. There were no more than 3 hours worked per  
13 performance for either of those shows, 16 shows of each  
14 performance. And I believe White Christmas had, in the first  
15 week, a five-hour rehearsal, and Annie, I believe -- or maybe  
16 it was vice versa, I think Annie may have had five hours and  
17 White Christmas had four hours.

18 Q If you turn to the second page, that's the breakdown, is  
19 that right?

20 A That's correct.

21 Q Just so the record is clear, the percentage add refers to  
22 what?

23 A That refers to a thing called doubling where a musician  
24 may play more than one instrument.

25 Q So if you look at Mr. Pinto, for example, he got a 50

1 percent addition because he plays multiple instruments?

2 A I believe that that's correct.

3 MR. TELEGEN: Madam Hearing Officer, unless you have any  
4 further questions about that document?

5 HEARING OFFICER BEDE: I don't believe so, no.

6 BY MR. TELEGEN:

7 Q Since Elf has been in discussion here today, first of all,  
8 what is Elf, in case anyone in the room doesn't know?

9 A Elf was a musical that played at the Wang Theatre this  
10 past December.

11 Q Were there musicians?

12 A There were.

13 Q Who hired the musicians?

14 A The producer.

15 Q Who decided who would hire the musicians?

16 A The producer.

17 Q Do you recall how many there were?

18 A I believe there were a total of eight musicians.

19 Q Did you have any contract with anybody, or any agreements  
20 with anybody, or any undertaking with anybody that disabled you  
21 from agreeing to the producer's bringing its -- hiring its own  
22 musicians?

23 A No.

24 Q Do you know whether the producer of Elf has a collective  
25 bargaining agreement with any musicians union?

1 A I don't know for a fact.

2 Q Would there be any shows in -- currently scheduled in 2016  
3 that would require live music?

4 A We are under discussion. We are not fully contracted yet,  
5 so the terms have not been agreed to. We have Wizard of Oz  
6 coming in, in April, but the contract for the show is not  
7 completed yet and, therefore, our terms of what they may or may  
8 not be asking us to provide are not set.

9 Q And just so the record is clear, that's different than The  
10 Wiz?

11 A That's different.

12 Q More true to the original story.

13 MR. TELEGEN: No further questions.

14 HEARING OFFICER BEDE: Would you like to cross-examine the  
15 witness?

16 MR. DUMONT: I would love to.

17 CROSS-EXAMINATION

18 BY MR. DUMONT:

19 Q All right, where should we begin. You said you've been  
20 with the Wang for 19 years or so, is that correct?

21 A That's correct.

22 Q Did you have any involvement with the Boston Musicians  
23 Association's collective bargaining agreement the last which  
24 extended through to 2008?

25 A In terms of the negotiation?

1 Q Let's start there, in terms of the negotiations, did you  
2 participate at all in any of the bargaining sessions?

3 A I believe I was involved in sessions, certainly I believe  
4 when we signed the extension.

5 Q Were you familiar -- are you familiar sort of generally  
6 with the terms and conditions that were in the 2003-2007  
7 collective bargaining agreement that was extended for one year.

8 A Somewhat, somewhat.

9 Q Now I believe in answer to your counsels' questions, for  
10 example, if I recall correctly, you said something to the  
11 effect that the producer would control whether live music, as  
12 opposed to recorded music, was performed or used in a musical.  
13 Do you recall that testimony?

14 A That's correct.

15 Q That was not the case up through 2008, correct?

16 A I believe there was a clause in the agreement that  
17 prevented us from using a show.

18 Q And in that 2003-2007 agreement that was extended to 2008,  
19 there was a side letter, do you recall that, that was executed  
20 by Barbara Owens, who was the then president of the BMA?

21 MR. TELEGEN: I think maybe you could direct his attention  
22 to that.

23 MR. DUMONT: Okay. This is what's already there.

24 HEARING OFFICER BEDE: Okay.

25 MR. DUMONT: I mean I didn't bring extra copies. The

1 document is Exhibit A to the position statement.

2 BY MR. DUMONT:

3 Q So I'm directing the witness' attention to Article 8, use  
4 of live music. That would be the provision you would be  
5 referring to that prohibited the use of recorded music to  
6 displace musicians?

7 A That would prohibit us from using -- presenting a show,  
8 right.

9 Q Just so I'm clear, and I'll get to Barbara Owens' letter,  
10 but when your counsel was having you define terms, producer  
11 versus promoter, versus four-wall rental situation, that was  
12 the same back in 2003 to 2007, correct?

13 A Yes.

14 Q The Wang Theatre similarly had producers come in and they  
15 would present -- they potentially would present as what we  
16 refer to as a four-wall rental, which was the first description  
17 that you had, which is they pay you for the structure. They  
18 take all the risk. And then the other way where the Wang would  
19 also promote. Correct?

20 A That's correct.

21 Q The issue relative to how production, musical productions  
22 were presented at the venue, at the Wang, in terms of the  
23 respective responsibilities, that was the same during 2003 to  
24 2008 as it is today, correct?

25 MR. TELEGEN: Objection. You say the issues. Do you mean

1 has the pressure to do business one way or the other changed  
2 since then or does the definition of those terms stay the same?

3 Those are different questions.

4 BY MR. DUMONT:

5 Q Let me ask it this way. Back in 2003-2008, producers  
6 contracted with the Wang, correct?

7 A That's correct.

8 Q To have presentations, correct?

9 A That's correct.

10 Q And currently, we see three of them, there are musicals  
11 that are contracted with the Wang, correct? We had Annie. We  
12 had White Christmas and most recently Elf. Correct?

13 A That's correct.

14 Q Other than the fact that we don't have a collective  
15 bargaining agreement in place right now, is there anything  
16 different between the authority and the responsibilities of a  
17 producer today versus a producer back in 2006?

18 A I don't believe so.

19 Q So back in 2006, 2007, we had a collective bargaining  
20 agreement that said that a producer who came in couldn't use  
21 recorded music to displace our bargaining unit, correct?

22 MR. TELEGEN: Asked and answered. The document speaks for  
23 itself. It says what it says.

24 HEARING OFFICER BEDE: I'm just going to let him continue  
25 the question just for the flow of the back and forth. Don't

1 make seven meals out of it, but you can go for this time.

2 MR. DUMONT: I'm just trying to make sure the record is  
3 clear.

4 HEARING OFFICER BEDE: Yes.

5 MR. DUMONT: And I don't think the record was clear on  
6 direct.

7 BY MR. DUMONT:

8 Q My question is under that collective bargaining agreement,  
9 the producer didn't have the right to use recorded music,  
10 correct?

11 A That's correct.

12 Q Now turning your attention to -- I'll put it in front of  
13 you. Do you recall the show the Rockettes?

14 A Yes.

15 Q That Rockettes came in for its first run in December of  
16 2004. Do you recall that?

17 A That's correct.

18 Q Now I'm going to show you what is Appendix D to Exhibit A.  
19 Do you recall the circumstances at all relative to that  
20 addendum?

21 A Yes, I recall this addendum.

22 Q Why was that addendum necessary?

23 A If I recall correctly, because there was discussion from  
24 the musicians association on considering the Radio City  
25 Christmas Spectacular a theatrical musical, which it was not.



1 Q So there was a disagreement between the Union and the  
2 venue, the Wang, over whether Rockettes would be subject to the  
3 live music prohibition, correct?

4 A That's correct.

5 Q That disagreement was resolved by virtue of the  
6 Appendix D, which created a sort of whole timeless situation  
7 for the Wang, correct?

8 A That's correct.

9 Q Moving forward to the testimony you gave relative to the  
10 proposed successor agreement to the 2003-2008, well, 2004 to  
11 2007, extended to 2008, and so I don't have to go back to my  
12 office, I'm hoping I can clarify this, but if I have to -- were  
13 you involved in those negotiations?

14 A I believe I participated in those discussions.

15 Q Do you recall that the parties reached a tentative  
16 agreement on the successor agreement?

17 A I don't know at what point we stopped.

18 Q Do you recall seeing a document that was prepared by your  
19 counsel that marked up in a professional manner, unlike what I  
20 could do, that marked up the 2004-2007 collective bargaining  
21 agreement to show what the tentative agreement was?

22 A There were discussions underway. At what point they were  
23 at, I would have to go back.

24 Q I'll get it at lunch. But let me ask you this, do you  
25 recall that at a point in time that the parties were unable to

1 consummate that successor agreement, there was a change in the  
2 leadership of the Boston Musicians Association?

3 A At some point, there was a change in the leadership.

4 Q Do you recall that -- that change in leadership is the  
5 current president, Mr. Hollenbeck?

6 A That would be correct.

7 Q Do you recall that the negotiations over the successor  
8 agreement broke down over the issue of whether Mr. Hollenbeck  
9 would extend the waiver for the Rockettes?

10 A I don't know.

11 Q But you testified, I believe, on direct that -- so it's  
12 your memory that the negotiations were bogged down on a lot of  
13 different issues that it really was about the fact that the  
14 employer couldn't dictate the terms and conditions? Is that  
15 your testimony?

16 A I believe that that's correct.

17 Q And it's not that the Wang -- the Wang, by the way, at  
18 that point in time was a partnership with Madison Square  
19 Gardens on the Rockettes, correct?

20 A Wang was in partnership with Madison Square Gardens on  
21 booking the theater, not on Radio City Christmas Spectacular.

22 Q We'll deal with that after lunch. I'll have to go back to  
23 my office. I didn't realize that would be an issue. Okay, so  
24 now you testified that Elf did not require local musicians, is  
25 that correct? Did I hear that correctly?

1 MR. TELEGEN: He said it didn't require the Wang to hire  
2 local musicians.

3 MR. DUMONT: Well, let the record say whatever it says.

4 BY MR. DUMONT:

5 Q Local musicians were hired, correct?

6 A I do not know where Elf hired the musicians.

7 Q You do know that the -- you're actually signatory to the  
8 Elf contract between Elf and the LLC that was formed by --  
9 that's Net?

10 MR. TELEGEN: NETworks.

11 BY MR. DUMONT:

12 Q NETworks. Just so the record is clear, are you familiar  
13 with the fact that NETworks creates an LLC when they take a  
14 tour so that it's --

15 A I understand that NETworks would have, yes, that is normal  
16 course of business.

17 Q I believe it's your name and your initials that are on the  
18 Elf contract, correct?

19 A That's correct.

20 Q Is it your name on the Annie and White Christmas, also?

21 A Yes, it is.

22 MR. TELEGEN: He doesn't have the documents in front of  
23 him.

24 MR. DUMONT: I can get them there. I didn't know that his  
25 memory was that bad that he'd forget that he was signatory to

1 the contracts. I've always found his memory to be pretty good.  
2 But I can get them.

3 MR. TELEGEN: If you're going to ask him to testify about  
4 the contracts, you probably ought to put the contracts in front  
5 of him.

6 HEARING OFFICER BEDE: All right, we'll put the contract  
7 in front of him.

8 MR. DUMONT: I'll get it in front of him. I was just  
9 trying to spare us from putting -- I thought he might remember.

10 HEARING OFFICER BEDE: It's usually a little hard to  
11 remember when you're sitting in the witness chair. We'll let  
12 him reference whatever he likes.

13 BY MR. DUMONT:

14 Q Let me back up for a second. Which came first, Annie or  
15 White Christmas?

16 A Annie came first.

17 Q Annie came first, okay.

18 MR. DUMONT: I've put in front of the witness, it's  
19 Exhibit H to the position statement.

20 BY MR. DUMONT:

21 Q I can use this one. The template for that agreement, is  
22 that a template that the Wang has?

23 A That is a template that we, whether it's us or in  
24 partnership with our partner who presents a show with us, MSG.

25 Q Look at Page 3, Section E. I guess you could go back to

1 Page 2, but that's a provision we just sort of generally  
2 testified to relative to the hiring, the staffing of musicians?

3 A Yes.

4 Q And in that particular one, I don't have it in front of  
5 me, but there were so many that were going to be touring  
6 musicians and how many were going to be --

7 A There were 13 musicians for Annie. The producer traveled  
8 with 5 and needed 8 hired locally.

9 Q Those were hired locally, correct?

10 A That's correct.

11 Q Then if you turn over to Section 4(g), it suggests that  
12 the expense incurred by the Wang Theatre would be a local  
13 documented expense, is that correct?

14 A That's correct.

15 Q What is a local documented expense?

16 A Those are expenses that the promoter of the show would  
17 incur in presenting the show on behalf of -- based on what is  
18 required.

19 Q Is that local documented expense sort of allowed to be  
20 counted for when you make -- when the theater and the producer  
21 split up what is hopefully left over is extra, is that correct?

22 A Yes. When we promote a show, the local document, just  
23 like what we pay the producer, the local documented expense  
24 comes out of the ticket receipts.

25 Q I don't have it in front of me, but looking through that

1    template -- looking through that agreement, is there any places  
2    where it was changed or --

3            MR. TELEGEN: I have to object to that question. I don't  
4    know what it means.

5            HEARING OFFICER BEDE: Can you phrase it more  
6    specifically?

7    BY MR. DUMONT:

8    Q    Is there anything on that agreement that is handwritten or  
9    is it all just typed as-is, other than your signature?

10           MR. TELEGEN: This document speaks for itself, Madam  
11    Hearing Officer. You can thumb through the pages and see  
12    what's handwritten and what's not. It's not a secret.

13           HEARING OFFICER BEDE: But to make the transcript a little  
14    clearer, I will allow him to answer the question.

15           MR. DUMONT: We're building to something, trust me.

16           HEARING OFFICER BEDE: All right.

17           MR. DUMONT: We believe it's relevant.

18           HEARING OFFICER BEDE: All right, overruled. You can  
19    answer the question.

20           THE WITNESS: There are a couple of other handwritten  
21    marks in the agreement.

22    BY MR. DUMONT:

23    Q    Would those have been something that you initialed? Is  
24    that your initials there?

25    A    Those are my initials.

- 1 Q And those would be as it relates to --
- 2 A From this, a tour name, another note here that was added
- 3 in an advertising section, terms.
- 4 Q And that's your initials.
- 5 A Yeah.
- 6 Q All right, that will speak for itself. I would just make
- 7 one note here. This is dated October 28, 2014, correct?
- 8 A Yes.
- 9 Q Would you have been the person who generated this final
- 10 document or had it generated at your direction?
- 11 A I would have reviewed that document. It would have been
- 12 generated by our legal counsel.
- 13 Q Now White Christmas, this is also one that you signed?
- 14 A That's correct.
- 15 Q This one is dated December 9, 2014.
- 16 A That's correct.
- 17 Q When did that play -- the record will show. It would have
- 18 been after December 9th?
- 19 A The dates are December 16th to the 28th.
- 20 Q Once again, is there any negotiations involved, that you
- 21 were involved in on this?
- 22 A There are negotiations on the terms of every single
- 23 agreement.
- 24 Q What was your involvement with the Elf agreement, if any?
- 25 A Again, same thing. It was prepared by our legal counsel,

1 negotiated, and then signed.

2 Q So if I understand that correctly, the legal counsel would  
3 prepare it, then it would come to you and if there are changes,  
4 I guess potentially you would make those changes in the  
5 document?

6 A Typically, I would not make --

7 MR. TELEGEN: Objection. I don't know what that means.  
8 Again, presumably, the witness could not unilaterally change a  
9 document that's been negotiated with another party.

10 HEARING OFFICER BEDE: To clarify, what sort of changes  
11 are you asking?

12 MR. DUMONT: Why don't I get the document? We'll cut to  
13 the chase here.

14 BY MR. DUMONT:

15 Q Let me put in front of you what is Exhibit I to the  
16 position statement. Review that for a moment, would you,  
17 please?

18 A Okay.

19 Q In that document, I believe it's Section 3(e), I know it's  
20 the (e), but I'm not sure whether it's 3 or not.

21 MR. TELEGEN: Does he have a question?

22 MR. DUMONT: I'm directing -- I asked him, I don't have it  
23 in front of me, but I thought --

24 THE WITNESS: 3(e) starts the engagement of all musicians.  
25 Is that the provision you want?



1 MR. DUMONT: No, I'll take that back. It's 2(e).

2 MR. TELEGEN: Mine doesn't have a 2(e).

3 THE WITNESS: It's 3. That's the paragraph you're  
4 referring to?

5 MR. DUMONT: Yeah, it is 3. Okay. So (e) has been  
6 modified in handwriting, correct, from the template, is that  
7 correct?

8 MR. TELEGEN: I'm sorry, there's an assumption in that  
9 question there is a template. I'm not sure what the template  
10 is. There was a draft. It looks like it was modified  
11 computer-wise because it's black-lining showing, so something  
12 got modified to do that and the modifications show in the  
13 document.

14 MR. DUMONT: Please excuse the word template. I have not  
15 compared line by line all three documents, but they certainly  
16 appear to the naked eye to be very similar, but I won't use  
17 that word. To the extent it is, it's only my word, not the  
18 witness' word.

19 HEARING OFFICER BEDE: All right, so noted.

20 BY MR. DUMONT:

21 Q So you see the changes that have been made to the lawyer's  
22 draft that has been stricken and handwritten, correct?

23 A That's correct.

24 Q Is that your writing? Is that something you did?

25 A That is not my writing.

1 Q Do you have any idea how that came to be part of the  
2 agreement?

3 A During the negotiations between our legal counsel and the  
4 producer.

5 Q So if that was done by your legal counsel, would there  
6 have been some reason why that would not have been -- would  
7 have required that to be changed in the manner that it was,  
8 that is using a ruler and longhand?

9 MR. TELEGEN: Objection. Hypothetical and I think the  
10 premise of the question is wrong. All the witness can say is  
11 to what the people who negotiated the agreement. He can't  
12 testify as to why somebody changed it unless someone told him.

13 HEARING OFFICER BEDE: Did anyone tell you how this part  
14 of the agreement happened to be changed or do you not know?

15 THE WITNESS: No, I do not know.

16 HEARING OFFICER BEDE: All right.

17 BY MR. DUMONT:

18 Q So directing your attention forward to Section 4, I  
19 believe it's Section 4(g), do you understand the import of the  
20 two changes that I directed your attention to, understand the  
21 import of that?

22 MR. TELEGEN: Objection. I don't want to obstruct, but do  
23 we mean the not unreasonably withheld or the way musicians  
24 would be accounted for?

25 BY MR. DUMONT:

1 Q Let me say it this way, under the Annie and the White  
2 Christmas agreements, the locally sources musicians were hired  
3 by the Wang, correct?

4 A They were hired by the Wang for the producer, correct.

5 Q Right, for the production, the production that the Wang  
6 was promoting, correct?

7 A The promotion that we had engaged to promote.

8 Q And the expenditure for the locally sources musicians was  
9 counted for as a local direct expense, correct?

10 A That's correct.

11 Q And in Elf, what occurred was the locally -- the local  
12 musicians were put on the producers' payroll, and the Wang  
13 agreed to reimburse the producers for the cost of those  
14 employees, correct?

15 MR. TELEGEN: Objection. The document speaks for itself.  
16 But it says locally -- local expenses, explicit what it says.  
17 And the witness has already testified what that means, it comes  
18 off the ticket revenue when you're doing the accounting.

19 MR. DUMONT: But that's not how it happened at Elf,  
20 correct? Or is it?

21 MR. TELEGEN: The witness can answer that question.  
22 Sorry, the witness can answer the question that just got asked,  
23 was it treated as a local expense.

24 THE WITNESS: It was treated as a local expense.

25 BY MR. DUMONT:

1 Q And the amount that was treated as a local expense was  
2 reimbursed to the producer, correct?

3 MR. TELEGEN: Objection.

4 HEARING OFFICER BEDE: Overruled. I'm not going to let  
5 you do this all day, but you can do it this time. Yes, you can  
6 follow this train of questioning through one more time, but  
7 that's it.

8 BY MR. DUMONT:

9 Q The last page, I believe the last page of this agreement,  
10 excuse me, the last page of this agreement represents what, if  
11 you know?

12 A The cost that was -- the local documented expense that was  
13 paid for the musicians as we negotiated in the agreement.

14 Q That was the local documented expense that was paid by the  
15 producer and reimbursed by the Wang, correct?

16 MR. TELEGEN: Objection to the last phrase. He already  
17 said what a local reimbursed expense means. It's not -- he can  
18 explain it again, but when he said the Wang paid the producer,  
19 I mean I don't believe that's what he's testified to.

20 HEARING OFFICER BEDE: If that's not what he's testified  
21 to then he can correct the assumption and make it clear on the  
22 record.

23 THE WITNESS: It was a local documented expense that we  
24 paid as part of this show.

25 BY MR. DUMONT:

1 Q Let me ask you this, do you know if any other contract  
2 between the Wang, as the promoter, and any producer in which  
3 the flow of money is as is set forth in the Elf agreement?

4 A We have had other shows that we have paid for a certain  
5 number of musicians to the producer as a local documented  
6 expense.

7 Q That the producer would have hired the local musicians?

8 A That we've paid for musicians, I should say.

9 Q You did for White Christmas. You did for Annie. Correct?

10 A No, but I mean we've paid the producer for musicians, a  
11 certain number of musicians. That was part of the financial  
12 terms of the presentation, for whatever reason.

13 Q Do you recall any other agreement in which the Wang paid  
14 the producer for local musicians?

15 A I don't, wouldn't have any knowledge to say.

16 Q That particular contract has -- instead of the simple date  
17 that is on the Annie and White Christmas, has a date that says  
18 "as of" the October date, did you have any involvement in  
19 backdating that?

20 MR. TELEGEN: Objection. No one has testified it was  
21 backdated.

22 BY MR. DUMONT:

23 Q Well, what does -- do you have any knowledge as to what  
24 "as of" means?

25 A I --

1 Q Okay. So to your knowledge, the changes that are made to  
2 that -- do you have any idea when the changes to that agreement  
3 were made?

4 A No.

5 Q You don't have any knowledge as to why they were made?

6 A They were negotiated. The changes were negotiated  
7 changes.

8 Q Now, okay, let's get this back so I don't lose it.

9 A I'm not sure if this is in the correct order.

10 Q That's okay, don't worry about it.

11 MR. TELEGEN: Let the record reflect that Mr. Dumont has  
12 destroyed the stapler.

13 MR. DUMONT: For which I will be charged.

14 COURT REPORTER: No, I did it.

15 BY MR. DUMONT:

16 Q Am I correct that at the Wang, we are currently in the  
17 2015-2016 seasons?

18 A That is one way of classifying presentations.

19 Q That's how it is reflected on the web site, correct?

20 A From the shows perspective, yes.

21 Q And that's, I don't want to use the word standard, but  
22 that's been around for a fairly long time that in theater they  
23 generally are dark or near dark during the summer, and the  
24 season runs from late summer, early fall to May or June?

25 A We are not dark during the summer on a regular basis.

1 We're dark in January.

2 Q But you would agree with me that publicly it is being  
3 presented as the season is 2015-2016?

4 A That is one representation of it. But we do not have a  
5 formal season.

6 Q I believe you testified to this, but I just want to make  
7 sure I'm clear. When a show like Elf comes in that needs to be  
8 people who do the lighting, and the sound, and the set,  
9 correct?

10 A Correct.

11 Q Somebody needs to load them in and somebody needs to load  
12 them out, correct?

13 A Correct.

14 Q You can't put on the show without that, correct?

15 A That's correct.

16 Q And most of the time, certainly if it's a musical, it's a  
17 production, you're going to need -- the producer is going to  
18 need to have wardrobe people, correct?

19 A Correct.

20 Q And of course if you let public into the theater, you need  
21 to have ushers for those shows, correct?

22 A That's correct.

23 Q And you can't leave the Teamsters out, because they need  
24 their takes, too, so you need to have some Teamsters who are  
25 going to take it off the truck and get it on your loading dock,

- 1 correct?
- 2 A That's correct.
- 3 Q In all of those instances, those are subject to collective
- 4 bargaining agreements that are negotiated by the Wang and
- 5 respective locals, correct?
- 6 A That's correct.
- 7 Q The producers who come in, they don't have a say as to
- 8 what the ushers are going to be paid, correct?
- 9 A That's correct.
- 10 Q And they don't have a say as to what the Teamsters are
- 11 going to be paid.
- 12 A That's correct.
- 13 Q Or the stagehands, correct?
- 14 A Correct.
- 15 Q Or the terms and conditions of those individuals, correct?
- 16 A Correct.
- 17 Q And when we're talking about relative expense for a
- 18 musical that comes in, we're talking about probably, generally
- 19 speaking, the stagehands would be the biggest expense, correct,
- 20 versus the --
- 21 A Probably.
- 22 Q Yes, exactly. And the producers just accept the fact that
- 23 these terms and conditions are what apply to their shows when
- 24 they play at the venue, correct?
- 25 A Yes.



1 Q They may not like it, correct? Wish they could pay less,  
2 but they are subject to those --

3 A Correct.

4 Q -- terms and conditions, correct? Has the Wang ever taken  
5 the position, to your knowledge, that it shouldn't negotiation  
6 -- can no longer negotiate with the Teamsters?

7 A No.

8 Q How about with the stagehands?

9 A No.

10 Q How about with the wardrobe?

11 A No.

12 Q How about with the ushers?

13 A No.

14 Q But you're taking the position that the Wang should no  
15 longer negotiate with the musicians?

16 MR. TELEGEN: Objection. He's not taking any position, I  
17 am.

18 HEARING OFFICER BEDE: All right, sustained.

19 MR. DUMONT: That's fine.

20 BY MR. DUMONT:

21 Q Okay. Let's touch on the role of the contractors. So the  
22 contractors, if there's been a long-term contractor, who is the  
23 long-term contractor to the Wang?

24 A Fred Buda.

25 Q Fred, do you know is Fred a member of the Boston Musicians

1 Association?

2 A It's my understanding that he is.

3 Q And he actually plays some, too, doesn't he?

4 A Plays quite a bit.

5 Q Does the Wang -- what's the nature of the Wang's  
6 relationship with Mr. Buda when he is not playing, but when he  
7 has acted in the past as a contractor? Is he paid for that?

8 A He's paid for contracting.

9 Q Is he paid as an independent contractor or is he W-2'd, if  
10 you know?

11 A He's W-2'd.

12 Q So when we're talking about those situation that, in the  
13 past, the Wang has hired local musicians, they've been hired --  
14 they've been identified and hired by an employee of the Wang,  
15 correct? That would be somebody that you W-2, correct?

16 A Correct.

17 Q I wasn't sure that was clear.

18 MR. DUMONT: If I could just have a moment? I just may be  
19 done.

20 HEARING OFFICER BEDE: Off the record for a moment.

21 (Pause off the record from 11:41 a.m. to 11:41 a.m.)

22 HEARING OFFICER BEDE: On the record.

23 BY MR. DUMONT:

24 Q Do you have any knowledge as to whether the travelers,  
25 when local musicians are hired and there are also traveling

1 musicians, do you have any knowledge as to whether the terms  
2 and conditions for the travelers are the same or different than  
3 for the local musicians?

4 A I do not know.

5 Q And the Wizard of Oz, that's coming in when, April?

6 A In April.

7 Q Do you know whether the Wizard of Oz is coming in under  
8 Pamphlet B?

9 A I don't know for a fact right now.

10 Q Is it your understanding that it is coming in under  
11 Pamphlet B?

12 MR. TELEGEN: I'm not sure that's different.

13 THE WITNESS: I don't know, I have --

14 MR. TELEGEN: Objection.

15 HEARING OFFICER BEDE: Sustained. If he doesn't know, he  
16 doesn't know.

17 MR. DUMONT: Now if I could go off the record for a moment  
18 -- not off the record, I won't say that. Can I have a moment?

19 HEARING OFFICER BEDE: Are we sure this time? Okay, off  
20 the record, please.

21 (Pause off the record from 11:42 a.m. to 11:44 a.m.)

22 HEARING OFFICER BEDE: Back on the record.

23 MR. DUMONT: I have no further questions of this witness.  
24 Thank you.

25 HEARING OFFICER BEDE: Thank you. Redirect, Mr. Telegen?

1 MR. TELEGEN: Sure.

2 REDIRECT EXAMINATION

3 BY MR. TELEGEN:

4 Q If the Wang declined to book shows that use only recorded  
5 music, do they have other venues they can go to in Boston?

6 A They have other venues that they could play.

7 Q The Teamsters, they load things, take things off trucks  
8 and bring them into the theater?

9 A They load and unload the trucks.

10 Q Does it matter what show there is to when they load and  
11 unload the trucks?

12 A No.

13 Q Is there any artistic content to the loading and unloading  
14 of trucks?

15 A No.

16 Q Although, the Teamsters might disagree. And the ticket  
17 takers, do they do the same thing for every show?

18 A That's correct.

19 Q And the ushers, do they ush (sic) the same way for every  
20 show?

21 A That's correct.

22 Q Now the wardrobe people and the stagehands, do they have  
23 to adjust to the particular show?

24 A To some extent, yes.

25 Q But do they perform the same function?

1 A They perform essentially the same basic function.

2 Q Someone who operates the lights, operates the lights?

3 A Typically, the show operates the lights. We actually do  
4 not.

5 Q And the people who do the wardrobe, they take people's  
6 clothes off and put people's clothes on?

7 A Make repairs, yes, laundry.

8 Q What changes from show to show is just the costume?

9 A Pretty much.

10 MR. TELEGAN: No further questions.

11 HEARING OFFICER BEDE: All right, thank you. Any recross?

12 MR. DUMONT: Just a quick one.

13 RECCROSS EXAMINATION

14 BY MR. DUMONT:

15 Q Relates to the stagehands, the sound people, and the  
16 lighting -- let's start with the sound, that's under the  
17 direction of who?

18 A Our stagehands are under the direction of our production  
19 manager.

20 Q In terms of how the sound is going to be, I don't want to  
21 use the word handle, but I'll use it for lack of a better word,  
22 how the sound requirements, those come from who?

23 A Again, similar to the lighting, our stagehands would  
24 generally not be operating the actual sound console or the  
25 lighting console for a show, because that is very specific to

1 the show. They would be more in a supporting role.

2 Q But the schematic that would tell the stagehands what  
3 lights to put up and where, that would be done by the  
4 stagehands, correct?

5 A That would be correct.

6 Q And that would be at the direction, however the direction  
7 gets passed to them, at the direction of the show, correct?

8 A Information would be passed within the departments that  
9 they are working in.

10 MR. DUMONT: No further questions. Thank you.

11 HEARING OFFICER BEDE: Thank you. The witness can step  
12 down, thank you.

13 (Witness excused.)

14 HEARING OFFICER BEDE: Off the record for a moment.

15 (Whereupon, at 11:47 a.m., a luncheon recess was taken.)

16

1 A F T E R N O O N S E S S I O N

2 (Time Noted: 12:33 p.m.)

3 HEARING OFFICER BEDE: On the record.

4 Petitioner, can you call your first witness, please?

5 MR. DUMONT: yes, Mark Pinto, please.

6 HEARING OFFICER BEDE: Will you raise your right hand?

7 (Whereupon,

8 MARK PINTO,

9 was called as a witness by and on behalf of the Petitioner and,  
10 after having been duly sworn, was examined and testified as  
11 follows:)

12 HEARING OFFICER BEDE: Please have a seat. Will you state  
13 and spell your name for the record, please.

14 THE WITNESS: Mark Pinto, M-A-R-K, P-I-N-T-O.

15 HEARING OFFICER BEDE: All right, go ahead.

16 DIRECT EXAMINATION

17 BY MR. DUMONT:

18 Q Mr. Pinto, are you a musician by trade?

19 A Yes.

20 Q Do you play performances?

21 A Yes, regularly.

22 Q Do you hold a position with Boston Musicians Association?

23 A Yes. I'm the secretary/treasurer.

24 Q The Boston Musicians Association, is that a local under  
25 the jurisdiction of the American Federation of Musicians?

- 1 A Yes.
- 2 Q Within the structure of the AFM, is there an association  
3 known as the Theater Musicians Association?
- 4 A Yes, there is.
- 5 Q Do you hold a position with that office?
- 6 A I do. I am also the secretary/treasurer of the Theater  
7 Musicians Conference of the AFM.
- 8 Q What if any does the conference do?
- 9 A The conference represents the interests of touring and  
10 local theater musicians.
- 11 Q How long have you been involved with the conference?
- 12 A I became treasurer, I want to say, in 2012, so it's been  
13 about 3 years.
- 14 Q How long have you been an officer with the BMA?
- 15 A I'm in my 21st year.
- 16 Q Are you familiar with the term Pamphlet B?
- 17 A Yes.
- 18 Q What is Pamphlet B?
- 19 A Pamphlet B is an agreement negotiated between the American  
20 Federation of Musicians, the international office, and the  
21 Broadway Producers for Touring Productions. In that agreement  
22 are the wages and working conditions for touring, traveling  
23 musicians.
- 24 Q Are those people referred to as travelers?
- 25 A Yes.



1 Q Are you familiar with the term SET agreement?

2 A Yes. SET agreement stands for short engagement tour.

3 It's sort of a subset of Pamphlet B.

4 Q What distinguishes -- is the SET agreement, who negotiates  
5 the SET agreement?

6 A The AFM negotiates with the producer.

7 Q Are you familiar with the term Rule 24?

8 A Yes.

9 Q What is Rule 24?

10 A Rule 24 addresses the hiring of local musicians when a  
11 show is traveling self-contained. So if a musical is  
12 self-contained, when they get to a city or a venue that has  
13 minimums, Rule 24 takes effect and it dictates the number of  
14 local hires.

15 Q Does Rule 24 apply to both Pamphlet B and the SET  
16 agreement?

17 MR. TELEGEN: Objection. If we're going to have testimony  
18 about documents that have legal effect, can we just have the  
19 documents rather than having this witness' understanding. I  
20 mean he's experienced, but the region has a right to see what  
21 the papers are he's testifying. For example, we don't know  
22 what Rule 24 is a part of. It comes before 23 and 25.

23 BY MR. DUMONT:

24 Q Is Rule 24 part of Pamphlet B?

25 A Yes.

1 MR. TELEGEN: And we don't know what Pamphlet B is, what  
2 kind of agreement between.

3 HEARING OFFICER BEDE: Do you plan to put the underlying  
4 documents into evidence?

5 MR. DUMONT: Rule 24 is already there. It's just by way  
6 of explaining where Rule 24 comes from.

7 MR. TELEGEN: I'm sorry. It's where?

8 HEARING OFFICER BEDE: Where in evidence is Rule 24?

9 MR. DUMONT: Rule 24 is the addendum to Exhibit A. It's  
10 Appendix G, it says Pamphlet B, touring theatrical musicals,  
11 Rule 24. It's a part of Exhibit A.

12 MR. TELEGEN: Madam Hearing Officer, that document expired  
13 December 31, 2007. The witness is testifying about it as if it  
14 exists, which it may well, but we don't know where it exists.  
15 It's an agreement between someone and someone.

16 MR. DUMONT: He just said who it's between. I don't know  
17 how anybody --

18 HEARING OFFICER BEDE: Has the rule been unchanged since  
19 that expired collective bargaining agreement or in current  
20 agreements is it a different rule?

21 THE WITNESS: It is unchanged since the expired agreement.

22 HEARING OFFICER BEDE: How much background is this witness  
23 going to give on various -- on the structure of the Union and  
24 these various rules?

25 MR. DUMONT: I'm not sure that we need to get much at all.

1 My dissertation and opening was not evidence, so the -- I don't  
2 know why this is so contentious, but Exhibit A, which was put  
3 in by my brother, if you go to Article 4, it makes specific  
4 reference to what Pamphlet B is. And it directs the reader to  
5 Rule 24, which is part of the appendix.

6 MR. TELEGEN: Madam Hearing Officer, the reason for this  
7 is, I think, pretty clear. Pamphlet B is no longer a  
8 contractual document as far as the record shows applicable to  
9 either the Petitioner in its relationship with the Wang. So if  
10 it has any significance here, it's either an historical  
11 document that's no longer in effect or it's a part of a  
12 contract that is far into this agreement. It's worth knowing  
13 where it is, what its current applicability is, and what it  
14 says, and, in fact, how it relates to other things. I assume  
15 it's Rules 1 through 23, and 25, et seq, and it's a rule. I  
16 don't see how that can particularly move the region one way or  
17 the other.

18 HEARING OFFICER BEDE: Mr. Dumont, what's the reasoning  
19 behind this line of questioning?

20 MR. DUMONT: The reasoning is I believe the fourth issue  
21 that's raised by the position statement goes to where we spent  
22 a fair amount of time with, which is sort of I'll characterize  
23 it as the futility argument. Somehow that since the producer  
24 is not at the table, at the Wang, somehow the petition should  
25 be dismissed because the Wang can't influence the terms and

1 conditions of employment. We've already spent considerable  
2 time on this. You have a document. We just had a witness who  
3 testified how the producer interacts with the venue hasn't  
4 changed since that document. I'm not the one who raised the  
5 issue. I can't understand the issue in light of the facts, but  
6 I didn't raise the issue.

7 HEARING OFFICER BEDE: All right, objection overruled. If  
8 it does just turn out to be historical, extraneous information,  
9 it's not going to hurt anything by being in the record. Please  
10 go on.

11 MR. DUMONT: Okay. Now I've forgotten where I was, but --

12 HEARING OFFICER BEDE: All right, start over, in that  
13 case.

14 BY MR. DUMONT:

15 Q You may have testified and I wasn't going to go much  
16 further than this, so in terms of -- what does Rule 24 do,  
17 where it is applicable?

18 A It dictates the amount of -- when a show is  
19 self-contained, meaning the musicians are traveling with the  
20 show, it will dictate the amount of local hires required for  
21 that engagement.

22 Q Was Rule 24 applicable when there was an in-force  
23 collective bargaining agreement at the Wang?

24 A Yes.

25 Q Were local musicians hired pursuant to Rule 24, to your

1 knowledge?

2 A Yes.

3 Q Were you one of those musicians?

4 A Yes.

5 Q Are the terms and conditions that applied to you when you  
6 were hired pursuant to Rule 24, were those terms and conditions  
7 as set forth in the agreement that's between the BMA and the  
8 Wang that's dated September 2004 to September 2007?

9 A Did they apply --

10 Q To you? When you were hired pursuant to Rule 24, were the  
11 terms --

12 A Oh, yes. Yes, they were.

13 Q Do these terms apply to travelers?

14 A No, they don't.

15 Q The terms that apply to travelers would be, where would  
16 they be found?

17 A In the agreement called Pamphlet B.

18 Q Would they also be found in the agreement referred to as  
19 the SET agreement?

20 A Yes.

21 Q To your knowledge, use for example the rehearsal  
22 requirements that were in effect under Exhibit A, which is the  
23 2004-2007 agreement, were those rehearsal requirements the same  
24 for you as a local musician and the travelers?

25 A When we are all rehearsing together, we're probably

1 working under the wages of two different agreements. In that  
2 case, we are -- if there is a five-hour rehearsal, we're all  
3 rehearsing a five-hour call. The difference would be the  
4 travelers may have multiple calls during a week, or a two or  
5 three-week run that the locals are not involved in, because  
6 they're traveling with the show and there's rehearsal calls  
7 we're unaware of that they have to be obligated to perform.

8 Q Just so the record is clear, what is a call?

9 A A call is a service, the local contractor notifies you of  
10 the hours of when you need to be present to rehearse, 9:00 to  
11 12:00, 10:00 to 2:00, and what time the performance is, an  
12 8 o'clock performance, you usually have to be there at 7:30.

13 Q Does the Boston Musicians Association, does it have a  
14 collective bargaining agreement with what we commonly refer to  
15 as the Opera House?

16 A Yes.

17 Q Do you, as a musician, play under that agreement at the  
18 Opera House?

19 A Yes, I do.

20 Q Do you play for productions listed -- to your knowledge,  
21 does the Opera House produce any productions that are shown at  
22 the Opera House?

23 A Not to my knowledge, no.

24 MR. DUMONT: Mark this for identification, Petitioner's 1.  
25 (Petitioner's P-1 identified.)

1 BY MR. DUMONT:

2 Q I'm not going to get into the terms of that, but would you  
3 just take a look at it and tell me if you could identify that  
4 document?

5 A Yes. This is the Boston Opera House agreement with the  
6 Boston Musicians Association.

7 Q That is currently in effect?

8 A That is currently in effect, yes.

9 Q When most recently have you played for a production at the  
10 Opera House?

11 A Just last week, Wednesday through Sunday.

12 Q What position description is that?

13 A Beauty and the Beast.

14 Q Were the terms and conditions -- Beauty and the Beast,  
15 that was not produced by the Opera House?

16 A No.

17 Q The terms and conditions that applied to you, while you  
18 were working last week are set forth in Petitioner's 1?

19 A Yes.

20 MR. DUMONT: I'd offer Petitioner's 1.

21 MR. TELEGEN: No objection.

22 HEARING OFFICER BEDE: Received.

23 (Petitioner's P-1 received.)

24 BY MR. DUMONT:

25 Q As part of your responsibilities as secretary/treasurer of

1 the Boston Musicians Association, do you track the -- track for  
2 lack of a better word, or do you record the dues and pension  
3 that are received by the BMA from the various venues?

4 A Yes.

5 Q Is that information in a database that you maintain?

6 A Yes.

7 Q From that database, are you able to report or have the  
8 database report the employment history of the various members  
9 at a venue such as the Wang?

10 A Yes.

11 Q And you can pull that for how far back?

12 A I can go back to probably 1988. Beyond that, it would be  
13 all hard copies.

14 MR. DUMONT: This is 2.

15 (Petitioner's P-2 identified.)

16 BY MR. DUMONT:

17 Q Mr. Pinto, can you identify what's been marked for  
18 identification as Petitioner 2?

19 A Yes. This is a work history report from my database  
20 listing musicians that have worked at the Wang Center.

21 Q It appears from my copy that there was some highlighting  
22 of individuals. Is that something that you did?

23 A Yes. I went through this report and the musicians who are  
24 highlighted, there's a lot of musicians here, but the musicians  
25 who are highlighted I would deem as the long-term, consistent



1 employees of the Wang Center for the dates set forth at the top  
2 of this report. And if we went even further back, these names  
3 would be pretty consistent.

4 Q And without having to go through this, this would be  
5 consistent with what the Employer has put on, there would be no  
6 start or end dates for 2015, correct?

7 A Correct.

8 Q There shouldn't be.

9 A Yeah, there's no 2015 dates here.

10 MR. DUMONT: I'd offer Petitioner's 2.

11 MR. TELEGEN: I have voir dire.

12 HEARING OFFICER BEDE: Sure.

13 VOIR DIRE EXAMINATION

14 BY MR. TELEGEN:

15 Q The start date and end date, does that tell you how many  
16 days were worked -- these are beginning week, ending dates?

17 A It's typically, yeah, begin date, end date. It's probably  
18 on the payroll report I get, it'll probably say week of 6/5.

19 Q This doesn't tell you how many hours the employee worked  
20 in that particular week?

21 A No.

22 Q It doesn't tell you how many days he or she worked in that  
23 particular week?

24 A No.

25 Q And when you say the people you deem to be the core, you

1    deem that based on these papers, is that correct?

2    A     Yes.

3    Q     Just so the record is clear, this is by weeks, so in some  
4    cases two weeks would be a single show, is that correct?

5    A     Yes.  There could be -- the way this report just gives the  
6    person's name and the weeks worked, it's not specific to the  
7    shows.

8    Q     So if we look at your entry, the week starting 11/2 and  
9    week starting 11/9 were the same show, is that correct?

10   A     Most likely, yes.

11   Q     I should say 11/9/14.

12   A     Yeah, that's a two-week show.

13   Q     And the same is true with 12/14 and 12/22, same show?

14   A     Right, that's Annie and White Christmas.

15   Q     So this is consistent with -- have you seen the document  
16   that the company submitted at least back to the 2014  
17   performances?

18   A     I believe not.

19           MR. TELEGEN:  No objection to the document.

20           HEARING OFFICER BEDE:  The document is received as  
21   Petitioner's 2.

22           (Petitioner's P-2 received.)

23           MR. DUMONT:  I don't believe I have any further questions  
24   for this witness.

25                                   CROSS-EXAMINATION

1 BY MR. TELEGEN:

2 Q Mr. Pinto, first of all, was Beauty and the Beast a  
3 Pamphlet B show?

4 A Beauty and the Beast was a completely non-union  
5 production, non-equity and non-AFM.

6 Q When you played at Beauty and the Beast, were you covered  
7 by the collective bargaining agreement?

8 A Yes.

9 Q So there were no -- was there a traveling orchestra with  
10 Beauty and the Beast?

11 A There is a traveling orchestra and we have in the Opera  
12 House document that was passed out, there are minimums in  
13 there, minimum staffing for non-union shows. There is a  
14 formula in there to staff a non-union show.

15 Q Do you know whether some of the non-union orchestra of  
16 Beauty and the Beast was laid off for the period of time that  
17 Beauty and the Beast was in Boston?

18 A Yes, they were laid off, yeah.

19 Q Do you know whether any charges were filed with the  
20 National Labor Relations Board on account of that lay off?

21 A No.

22 Q What other musicals were performed at the Opera House in  
23 2015?

24 A Motown the Musical, Newsies, Beautiful, Cinderella, and  
25 off the top of my head there could be another one in there.

1 Q Are you aware whether each of those musicals was conducted  
2 in complete compliance with the collective bargaining  
3 agreement?

4 A Yes, all those shows were AFM shows traveling over  
5 Pamphlet B and the local musicians were hired according to the  
6 agreement with the Opera House.

7 Q And all the rates were paid in accordance with the  
8 contract?

9 A Yes.

10 Q What other collective bargaining agreements are in effect  
11 in Greater Boston that are venue type contracts as opposed to  
12 orchestra type contracts? Does that distinction make sense to  
13 you?

14 A Yeah.

15 MR. TELEGEN: Does it make sense to the hearing officer?

16 HEARING OFFICER BEDE: I would actually like you to  
17 clarify that just a little bit.

18 BY MR. TELEGEN:

19 Q Okay. Your union has collective bargaining agreements  
20 with, for example, the Boston Symphony Orchestra?

21 A Yes.

22 Q And it covers the musicians who play week in, week out  
23 with the Boston Symphony Orchestra?

24 A Yes.

25 Q And it has such agreements with the Boston AFR (ph.)?

1 A Yes.

2 Q I won't go through the entire thing. There are orchestras  
3 in Boston and the population of the people who are covered by  
4 those contracts is largely stated.

5 A Correct, yes.

6 Q The contract you used to have with the Wang Theatre and  
7 used to have with the Shubert Theatre, and now have with the  
8 Boston Opera House are venue type contracts. They apply to  
9 people when they are hired to work at a particular performance,  
10 is that correct?

11 A Correct.

12 Q Other than the Boston Opera House, how many current  
13 collective bargaining agreements do you have in Greater Boston  
14 for venue type contracts?

15 A We have American Repertory Theater in Harvard, Huntington  
16 Theater Company. Those may be it. Formerly, we had the  
17 Shubert and the Colonial, which is now closed. But I want to  
18 say those are the three.

19 Q So ART, Huntington Theater, and --

20 A Boston Opera House.

21 Q Are there other venues which you don't have venue  
22 contracts?

23 A I suppose. There's plenty of venues, yeah.

24 Q There's no venue contract for Symphony Hall?

25 A No, there is not.

1 Q Or for Jordan Hall?

2 A There is not.

3 Q The Sanders Theater (ph.)?

4 A There is not. Most of our groups that go into those  
5 theaters we have agreements with, but not with those, not with  
6 the specific venue, correct.

7 Q Rather than keep us sitting here testing my memory of all  
8 the venues in Greater Boston, there are many, right?

9 A Yeah.

10 MR. TELEGEN: This is not an adjudicatory hearing. I  
11 thought we would see all the collective bargaining agreements  
12 that are venue type agreements. I would urge the Union to  
13 submit the ART and the Huntington Theater Company venue  
14 agreements, if they are readily available.

15 HEARING OFFICER BEDE: All right.

16 BY MR. TELEGEN:

17 Q You do other things than play at the Opera House, under  
18 that collective bargaining agreement, and on occasion at the  
19 Wang Theatre, where there is no longer a collective bargaining  
20 agreement, is that correct?

21 A Correct, yeah. I work other venues, yes.

22 Q And you belong to various groups that are -- are you a  
23 member of any symphony or other kind of orchestra agreement?

24 A I'm a freelance musician.

25 Q So you play venues, you play weddings, you play

- 1 bar mitzvahs?
- 2 A Yeah. I try to stay away from those, but, yeah.
- 3 Q What controls the terms and conditions of employment when
- 4 you play at a bar mitzvah, other than a 13 year old's whim?
- 5 A Typically, when you're freelancing in that setting where
- 6 there is no agreement in place, you're playing in a band that
- 7 everyone is a union member, and you're following the wages and
- 8 working conditions from the local scale.
- 9 Q Are there times when you don't play under the scale?
- 10 A Don't play at scale?
- 11 Q Yeah.
- 12 A Very rarely. It would have to be something very artistic.
- 13 Q So, to your knowledge, you're a very popular freelance
- 14 musician, is that correct?
- 15 A Correct.
- 16 Q There are other players who perhaps not as busy as you are
- 17 working at scale?
- 18 A Who aren't as busy as me, working at scale?
- 19 Q Yeah, who take jobs that aren't at scale.
- 20 A Oh, aren't at scale, I'm sure that happens all the time.
- 21 Q Is there anybody you know of who is as busy as you are in
- 22 the City of Boston?
- 23 A Oh, yeah, there's other people.
- 24 Q More than two dozen?
- 25 A Two dozen?

1 Q Yeah.

2 A Specifically, with what I do?

3 Q Yeah. Tell the hearing officer how many instruments you

4 play.

5 A I play woodwind instruments. I play a lot of woodwind

6 instruments.

7 Q Can you just indulge me?

8 A All the saxophones, clarinet, bass clarinet, flute,

9 piccolo, alto flute, so it's --

10 Q When you say all the saxophones, just for the record --

11 A Soprano, alto, tenor, baritone.

12 Q We talked over each other. Four, baritone, Tenor, alto,

13 and soprano?

14 A Those are the saxophones, yeah.

15 HEARING OFFICER BEDE: All right, let the record show the

16 hearing officer is duly impressed.

17 MR. TELEGEN: No further questions.

18 HEARING OFFICER BEDE: Any redirect?

19 MR. DUMONT: No redirect.

20 HEARING OFFICER BEDE: All right, you may step down.

21 Thank you.

22 THE WITNESS: Thank you.

23 (Witness excused.)

24 HEARING OFFICER BEDE: Are there any further witnesses

25 that either party intends to call?



1           MR. TELEGEN: I don't. Again, I would appreciate it if  
2 the Union would produce the other two collective bargaining  
3 agreements.

4           HEARING OFFICER BEDE: Does the Union have the other  
5 collective bargaining agreements at hand?

6           MR. DUMONT: The Union does not.

7           HEARING OFFICER BEDE: All right, if they aren't here,  
8 they aren't here.

9           MR. TELEGEN: Is Pamphlet B here?

10          MR. DUMONT: No, it's on my computer, all 90 pages of it.

11          MR. TELEGEN: Well, I'm sure the hearing officer will be  
12 willing to hold the record open for producing those contracts  
13 or Pamphlet B, till the end of the day?

14          MR. DUMONT: I'm not inclined. I'm content with what I  
15 put on. If they want it --

16          MR. TELEGEN: That's fine. If the Union is not going to  
17 produce it, the Union is not going to produce it, and the  
18 record is clear they're not producing it. Fine.

19          HEARING OFFICER BEDE: All right.

20          MR. TELEGEN: Because I'm fine, if that's the answer on  
21 the record.

22          HEARING OFFICER BEDE: Okay. Well, we are on the record  
23 and I don't believe that any issues have been resolved during  
24 the hearing, and I believe that the parties' positions remain  
25 what they were at the beginning of the hearing. Is that

1 correct?

2 MR. DUMONT: That's correct.

3 HEARING OFFICER BEDE: In the event an election is  
4 directed, I would like to discuss the election details. The  
5 Petitioner, when they filed the petition, said the best way to  
6 conduct an election would be by mail ballot. Is that still the  
7 Petitioner's position?

8 MR. DUMONT: I think, at this point, the answer is yes,  
9 since we have not heard whether the venue is going to hire  
10 local musicians in April. If they were, then I think in-person  
11 would make sense. But we have not been able to nail that down.

12 HEARING OFFICER BEDE: Does the Petitioner have any  
13 position on when the optimum time to send out those mail  
14 ballots would be?

15 MR. DUMONT: No.

16 HEARING OFFICER BEDE: Understanding that the Employer  
17 believes there should not be an election at any time, does the  
18 Employer have any comment on what the election details would be  
19 should an election be directed?

20 MR. TELEGEN: Should be at the Wang Theatre. My first  
21 choice would be next time all the bargaining unit members are  
22 employed. It seems like a logical time to find out who they  
23 want to have represent them, since they would all be there and  
24 we know who is there.

25 HEARING OFFICER BEDE: And when would the next time that

1 they would all be employed be, expected to be?

2 MR. TELEGEN: I don't know, is the answer.

3 HEARING OFFICER BEDE: But were there a direction of  
4 election otherwise, we could make a location available at a time  
5 and place convenient to the Board.

6 HEARING OFFICER BEDE: If there were to be a directed  
7 election, who would be the Employer's onsite representative?

8 MR. TELEGEN: I don't know, at this time.

9 HEARING OFFICER BEDE: Petitioner, if an election were  
10 directed, would you wish to go forward regardless of what that  
11 unit were directed to be, or are there any units that you know  
12 you would not want to represent?

13 MR. DUMONT: No, we would be prepared to go forward.

14 HEARING OFFICER BEDE: All right. The regional director  
15 will issue a decision in this matter as soon as practical and  
16 will immediately transmit the document to the parties and their  
17 designated representatives by email, facsimile, or by overnight  
18 mail if neither an email address or a facsimile number is  
19 provided.

20 If an election is directed, the Employer must provide the  
21 voter list. To be timely filed and served, the voter list must  
22 be received by the regional director and the parties named in  
23 the direction within two business days after the issuance of  
24 the direction, unless a longer period based on extraordinary  
25 circumstances is specified in the decision and direction of

1 election. A certificate of service on all parties must be  
2 filed with the regional director when the voter list is filed.  
3 The region will no longer serve the voter list.

4 The Employer must submit the voter list in an electronic  
5 format approved by the General Counsel unless the Employer  
6 certifies that it does not have the capacity to produce the  
7 list in the required format. The list must be filed in common,  
8 every day, electronic file formats that can be searched.  
9 Accordingly, unless otherwise agreed to by the parties -- can  
10 we go off the record for a second? Sorry.

11 (Pause off the record from 1:07 p.m. to 1:07 p.m.)

12 HEARING OFFICER BEDE: All right, back on.

13 The first column of the list must begin with each  
14 employee's last name and the list must be alphabetized, overall  
15 or by department, by last name. Because the list will be used  
16 during the election, the font size of the list must be the  
17 equivalent of Times New Roman 10 or larger. That font does not  
18 need to be used, but the font must be that size or larger.

19 The Board stated that it is presumptively appropriate for  
20 the Employer to produce multiple versions of the list where the  
21 data required is kept in separate databases or files, so long  
22 as all of the lists link the information to the same employees,  
23 using the same names.

24 If the Employer provides multiple lists, the list used at  
25 the election will be the list containing the employees' names

1 and addresses. The list must include the full names, work  
2 locations, shifts, job classifications, and contact  
3 information, including home addresses, available personal email  
4 addresses, and available home and personal cellular telephone  
5 numbers of all eligible voters.

6 The Employer must also include in a separate section of  
7 that list the same information for those individuals the  
8 parties have agreed will be permitted to vote subject to  
9 challenge, or those individuals who according to the decision  
10 and direction of election will be permitted to vote subject to  
11 challenge.

12 I know that the Employer's position is that there should  
13 be post-hearing briefs. Is that the Petitioner's position?

14 MR. DUMONT: I won't oppose it. It's not my position.

15 HEARING OFFICER BEDE: The regional director has concluded  
16 that briefs may be filed and they will be due by the close of  
17 business on 5:00 p.m., next Tuesday, January 19th. They may be  
18 filed by efilng on the Board's web site, by mail, or hand  
19 delivery, but not by fax.

20 Would either party like to make an oral argument now as we  
21 close the record?

22 MR. TELEGEN: No, but I'd like to make a statement before  
23 you close the record.

24 HEARING OFFICER BEDE: All right. Go ahead, make your  
25 statement.

1           MR. TELEGEN: I know you travel by script, as the hearing  
2 officer, and I appreciate the need for that. The Board's  
3 normal practice in respect to what people commonly call  
4 excelsior list, as amended by the Board's most recent  
5 regulations, makes absolutely no sense in this case.

6           Assuming that ultimately the regional director orders an  
7 election, I don't know yet what the frame on the universe of  
8 employees will be. I know for certain that none of the  
9 employees who have been employed by my client within the last  
10 14 months. I know that the Union has current information on  
11 presumably all the people that might be part of the bargaining  
12 unit. I would ask that in this case the Union be ordered to  
13 produce an excelsior list providing the names, the current  
14 addresses, the email addresses of any employee if the Board --  
15 if the region should order an election.

16          HEARING OFFICER BEDE: Okay. You have said your piece.  
17 The regional director will see that in the transcript and will  
18 respond accordingly.

19          MR. TELEGEN: I'm sure.

20          HEARING OFFICER BEDE: Is there anything else that we need  
21 to discuss before we close the record?

22          (No response.)

23          HEARING OFFICER BEDE: All right, the parties are reminded  
24 that they should request an expedited copy of the transcript  
25 from the court reporter. Late receipt of the transcript will

1 not be grounds for an extension of time to file briefs. And  
2 the hearing will be closed.

3 (Whereupon, at 1:11 p.m., the above-entitled matter was  
4 closed.)

5

1

C E R T I F I C A T E

This is to certify that the attached proceedings done before  
the NATIONAL LABOR RELATIONS BOARD REGION ONE

In the Matter of:

THE WANG THEATRE, INC., d/b/a CITI PERFORMING ARTS CENTER,  
Employer,

and

BOSTON MUSICIANS ASSOCIATION, a/w AMERICAN FEDERATION OF  
MUSICIANS, LOCAL UNION NO. 9-535, AFL-CIO,

Petitioner.

Case No.: 01-RC-166997

Date: January 13, 2016

Place: Boston, Massachusetts

Were held as therein appears, and that this is the original  
transcript thereof for the files of the Board

---

Official Reporter

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



# EXHIBIT C

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 5 U.S.C. 5517

DO NOT WRITE IN THIS SPACE

Case

Date Filed

01-CA-170371

02/24/2016

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

The Wang Theatre, Inc. d/b/a Citi Performing Arts Center

b. Tel. No. 617-482-9393

c. Cell No.

f. Fax No. 617-451-1436

g. e-Mail

mszczepkowski@citicenter.org

h. Number of workers employed  
16

d. Address (Street, city, state and ZIP code)

270 Tremont Street, Boston, Massachusetts  
02116

e. Employer Representative

Michael Szczepkowski, VP & General  
Manager

i. Type of Establishment (factory, mine, wholesaler, etc.)  
Performing Arts Center

j. Identify principal product or service  
Performing Arts

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1st subsections) (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

The Employer has discriminated and is continuing to discriminate against local musician employees because they have engaged and continue to engage in protected activity, i.e. seeking to be represented by the Boston Musicians' Association, Local 9-535. Specifically, the Employer refused to hire local musician employees for the production of Elf that occurred from November 17 through December 6, 2015 and has refused to hire local musician employees for the Wizard of Oz production from April 12-24, 2016.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

Boston Musicians' Association, Local 9-535

4a. Address (Street and number, city, state, and ZIP code)

130 Concord Avenue  
Belmont, Massachusetts 02478

4b. Tel. No. 617-489-6400

4c. Cell No. 617-212-9840

4d. Fax No. 617-489-6962


4e. e-Mail  
patorch@msn.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) American Federation of Musicians

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief

By

  
(signature of representative or person making charge)

Gabriel O. Dumont, Jr. Attorney

(Print/type name and title or office, if any)

Tel. No. 617-227-7272

Office, if any, Cell No.  
617-733-4804

Fax No. 617-227-7025

e-Mail  
gdumont@dmbpc.net

Address 141 Tremont Street, Suite 500, Boston, MA 02111

02/24/2016  
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

# **EXHIBIT D**



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 1  
10 Causeway St Fl 6  
Boston, MA 02222-1001

Agency Website: [www.nlrb.gov](http://www.nlrb.gov)  
Telephone: (617)565-6700  
Fax: (617)565-6725

Agent's Direct Dial: (617) 565-6720

March 17, 2016

Arthur G. Telegen, Esq.  
Seyfarth Shaw LLP  
Two Seaport Lane Ste 300  
Boston, MA 02210

Re: The Wang Theatre, DBA The Citi  
Performing Arts Center  
Case 01-CA-170371

Dear Mr. Telegen:

I am writing this letter to advise you that I will be taking evidence from you regarding the allegations raised in the investigation of the above-referenced matter. Set forth below are the allegations and issues on which your evidence is needed, a request for documentary evidence, and the date for providing your evidence.

**Allegations:** The allegations for which I am seeking your evidence are as follows.

- The Wang Theatre has had a past practice, spanning a period of at least several decades, of finding and hiring local musicians to supplement traveling musicians playing with traveling "Broadway-type" shows whenever those shows are configured to hire both local and traveling musicians.
- In 2015, for the first time in recent memory, no local musicians were hired for a run of "Elf" at the Wang Theatre, even though the show was traveling under a so-called "SET" agreement, under which a show would have a musical configuration that typically and traditionally would have resulted in the hiring of a complement of local musicians.
- In or around January 2016, several local musicians were hired for an upcoming production of "The Wizard of Oz," slated to be performed at the Wang Theatre in April 2016.
- A short time later, the local musicians hired for "The Wizard of Oz" were "un-hired."

- The Wang Theatre failed to hire local musicians for its runs of “Elf” and “The Wizard of Oz” because the musicians were involved in a union organizing campaign.
- The above is in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

**Board Affidavits:** I am requesting to take affidavits **no later than March 25, 2016** from Michael Szczepkowski, VP and General Manager of The Wang Center, as well as from any other individuals you believe have information relevant to the investigation of this matter. Please be advised that the failure to present representatives who would appear to have information relevant to the investigation of this matter, for the purposes of my taking sworn statements from them, constitutes less than complete cooperation in the investigation of the charge. Please contact me by **Monday, March 21, 2016** to schedule these affidavits.

**Documents:** In order to complete our investigation, the Region requests the following documents or information **by 5 p.m. on Thursday, March 24, 2016.** Please note that if you have not provided your evidence by the above date, the Regional Director may issue a subpoena for this information or may proceed to decide the case on the basis of information previously disclosed during the investigation. The term “document” includes, but is not limited to, any written, printed, recorded or graphic matter, including, but not limited to, memoranda, notes, minutes of meetings, communications, business records, electronic mail, text messages, letters, summaries of conversations or interviews, press releases, reports, records, summaries, lists, charts, compilations, statements, notebooks, files and announcements.

Please provide the following, along with any and all other evidence you deem to be relevant to the case:

- All documents involving The Wang Theatre’s decision not to hire musicians for performances of “Elf” in 2015.
- All documents involving The Wang Theatre’s initial decision to hire local musicians for the 2016 performance of The Wizard of Oz.
- All documents involving The Wang Theatre’s decision to “un-hire” local musicians for the 2016 performance of “The Wizard of Oz.”
- All documents in connection with the Boston Musicians Association demand for bargaining in 2015.
- All documents in connection with the 2015-16 organizing drive by the Boston Musician’s Association, Local 9-535.

- A position statement addressing the allegations in the above named charges.

**Date for Submitting Evidence:** To resolve this matter as expeditiously as possible, you must provide your evidence and a position statement in this matter by **by 5 p.m. on Thursday, March 24, 2016.** Electronic filing of position statements and documentary evidence through the Agency website is preferred but not required. To file electronically, go to **www.nlr.gov**, select **E-File Documents**, enter the **NLRB case number**, and follow the detailed instructions. If it is easier, you may email me the documents and your position statement as attachments to an email. If I have not received all your evidence by the due date or spoken with you and agreed to another date, it will be necessary for me to make my recommendations based upon the information or lack of information available to me at that time.

Also, as the investigation unfolds, please be advised that I may be requiring additional information or documents to complete my investigation.

Please contact me at your earliest convenience by telephone, (617) 565-6720, or e-mail, [lynda.rushing@nlrb.gov](mailto:lynda.rushing@nlrb.gov), so that we can discuss how you would like to provide evidence and I can answer any questions you have with regard to the issues in this matter.

Thank you and I look forward to working with you.

Very truly yours,

LYNDA RUSHING  
Field Attorney

# EXHIBIT E



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 1  
10 Causeway St Fl 6  
Boston, MA 02222-1001

Agency Website: [www.nlr.gov](http://www.nlr.gov)  
Telephone: (617)565-6700  
Fax: (617)565-6725

July 19, 2016

ARTHUR G. TELEGEN, ESQ.  
NICHOLAS HARPER, ESQ.  
SEYFARTH SHAW LLP  
TWO SEAPORT LANE, SUITE 300  
BOSTON, MA 02210

Re: THE WANG THEATRE DBA THE CITI  
PERFORMING ARTS CENTER  
Case 01-CA-170371

Gentlemen:

This is to advise you that I have approved the withdrawal of the charge in the above matter.

Very truly yours,

/s/ John J. Walsh, Jr.

JOHN J. WALSH, JR.  
Regional Director

cc: MICHAEL SZCZEPKOWSKI, VP & GENERAL MANAGER  
THE WANG THEATRE, INC. d/b/a  
CITI PERFORMING ARTS CENTER  
270 TREMONT ST.  
BOSTON, MA 02116-5603

GABRIEL O. DUMONT, ATTORNEY  
DUMONT, MORRIS & BURKE, PC  
141 TREMONT ST., SUITE 500  
BOSTON, MA 02111-1298

BOSTON MUSICIANS ASSOCIATION, LOCAL 9-535  
130 CONCORD AVE.  
BELMONT, MA 02478-4035